97TH CONGRESS
2d Session

SENATE

REPORT NO.
97-682

FINAL REPORT

OF THE

SELECT COMMITTEE TO STUDY UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE

TO THE

U.S. SENATE

DECEMBER 15 (legislative day, November 30), 1982—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
14-618 O WASHINGTON : 1983

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

S963-1

SELECT COMMITTEE TO STUDY LAW ENFORCEMENT UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE

CHARLES MC C. MATHIAS, JR., Maryland, *Chairman*
WALTER D. HUDDLESTON, Kentucky, *Vice Chairman*

JAMES A. MC CLURE, Idaho	DANIEL K. INOUYE, Hawaii
ALAN K. SIMPSON, Wyoming	DENNIS DE CONCINI, Arizona
WARREN B. RUDMAN, New Hampshire	PATRICK J. LEAHY, Vermont

ACKNOWLEDGMENTS

The Members of the Select Committee, Charles McC. Mathias, Jr., Chairman, Walter D. Huddleston, Vice Chairman, James A. McClure, Daniel K. Inouye, Alan K. Simpson, Patrick J. Leahy, Warren B. Rudman, and Dennis DeConcini, express their appreciation to the many individuals in the public and private sectors who provided invaluable assistance in the Select Committee's investigation, especially:

COMMITTEE COUNSEL AND STAFF

Malcolm E. Wheeler, Chief Counsel (October 17, 1982—January 15, 1983) and Deputy Chief Counsel (May 5—October 16, 1982); James F. Neal, Chief Counsel (May 5—October 17, 1982); Morgan J. Frankel, Special Counsel; William Lenox, Deputy Chief Counsel (December 17 1982—January 15, 1983) and Staff Counsel; Lisa B. Koteen, Staff Counsel; Mathew P. Jaffe, Staff Counsel; Donna M. Wheeler, Legal Assistant; Donna J. Phillips, Legal Assistant; Margaret S. Blackston, Legal Assistant; Nancy C. Hurt, Staff Assistant; Kenneth E. Mannella, Staff Assistant; Susan J. Krakower, Staff Assistant; Mark P. Miller, Staff Assistant; John A. Daly, Staff Assistant; Christopher Boffey, Director of Ancillary Services; and Lars Hanson, Assistant Director of Ancillary Services.

LAW FIRMS

The law firms of Hughes Hubbard & Reed (in particular, Philip A. Lacovara, Esq., Gerald Goldman, Esq., William T. Bisset, Esq., Scott M. Freeman, Bruce Judson, Michael Miller, Ruth L. Piekarski, and Deborah Johnson); Miller, Cassidy, Larroca & Lewin (in particular, Jonathan B. Sallet, Esq., and Michael Mello); Steptoe & Johnson (in particular, John E. Nolan, Jr., Esq., Charles A. Rothfeld, Esq., and John L. Sachs, Esq.); and Wilmer, Cutler & Pickering (in particular, Deborah M. Levy, Esq.).

OFFICE OF SENATE LEGAL COUNSEL

Michael Davidson, Senate Legal Counsel; M. Elizabeth Culbreth, Deputy Senate Legal Counsel; Charles Tiefer, Assistant Senate Legal Counsel; Nancy L. Bradshaw, Administrative Assistant; Sara E. Fox, Staff Assistant; Abigail S. Friedman, Staff Assistant; Barbara L. Thoreson, Staff Assistant; Carol Swetow, Staff Assistant; Dee Ann Weldon-Wilson Staff Assistant.

SENATE STAFF

Steven J. Metalitz, Staff Representative for Senator Mathias; John T. Elliff, Staff Representative for Senator Huddleston; James R. Streeter and Tom Hill, Staff Representatives for Senator Mc-

Clure; Sabina P. Golding, Staff Representative for Senator Inouye; E. Boyd Hollingsworth, Staff Representative for Senator Simpson; Sanford G. Kinzer, Staff Representative for Senator Leahy; Lee W. Mercer, Staff Representative for Senator Rudman; Edward H. Baxter, Staff Representative for Senator DeConcini.

CONGRESSIONAL RESEARCH SERVICE

Joseph E. Ross, Chief, American Law Division; Jay R. Shampansky, Legislative Attorney; Paul L. Morgan, Legislative Attorney.

DETAILED AND OTHER ASSISTANCE

The Committee on Rules and Administration (in particular, John B. Childers, Staff Director; Dennis G. Doherty, Auditor; Chrisopher D. Shunk, Assistant Auditor; Ann B. Cook, Chief Clerk; Carol M. Sewell, Staff Assistant); Select Committee on Intelligence (in particular, Dorothea N. Roberson, Chief Clerk); Subcommittee on Criminal Law of the Committee on the Judiciary (in particular, Maura Whelan and Pan Stevens); Committee on Governmental Affairs (in particular, Darrell Fountain); Committee on Banking, Housing & Urban Affairs (in particular, Dexter Bell); Chris Lermoyeau.

EXPLANATORY NOTE REGARDING CONFIDENTIAL AND SENSITIVE INFORMATION

On June 17, 1982, the Select Committee and the Department of Justice reached an agreement whereby members of the Select Committee and counsel to the Select Committee were given access to almost all of the confidential documents generated during the covert stage of the undercover operation known as Abscam.[1] The agreement provides that, while the Select Committee and counsel may use and publicly disclose information in the documents, the specific document containing particular information may not be publicly identified. Accordingly, this report does not refer to the specific confidential documents relied upon to support the Select Committee's conclusions. The Select Committee has filed with the Senate Office of Classified National Security Information a confidential version of this report that includes those specific references. Citations that appear in the confidential report and that are omitted from this report are indicated in this report by the designation "[Deleted]."

The agreement preserved the Select Committee's right to seek unrestricted access to all documents, if the Select Committee had concluded that the limited access was insufficient to have enabled it to perform its assigned tasks. Pursuant to the agreement, the Select Committee reviewed approximately 70 volumes of confidential Abscam files and found that its review of those documents was sufficient to enable it to fulfill its mandate under Senate Resolution 350. An effort to compel production of additional documents through subpoenas and litigation would have required a substantial extension of the deadline for filing the Select Committee's final report to the Senate, which Senate Resolution 350 specifies as December 15, 1982. Documents to which the Select Committee has not obtained access include some prosecution memoranda (memoranda containing prosecutors' professional opinions regarding the strengths, weaknesses, and advisability of pursuing particular cases); all grand jury material; some portions of Melvin Weinberg's informant file pertaining to Weinberg's pre-Abscam activities; and documents prepared or compiled by the Office of Professional Responsibility of the Department of Justice pursuant to its investigation of events related to the Abscam prosecutions in December 1980 and January 1981. The Select Committee has received oral briefings, including numerous direct quotes, on the factual portions of the prosecution memoranda and Office of Professional Responsibility documents to which the Select Committee lacked direct access. Grand jury material is, of course, controlled by the courts, not by the FBI or by other components of the Department of Justice.

---

[1] That agreement is reproduced in Appendix C to this report.

In addition, on July 16, 1982, the Select Committee unanimously voted to refrain from publicly mentioning public officials who had not been indicted and whose names had been mentioned by middlemen during the Abscam investigation. This was done to prevent any further harm to those innocent individuals who already had been harmed by the massive, improper leaks to the news media in February 1980. The Select Committee has adhered to that position in this report by omitting the names of, and information that might identify, those individuals, except for the few public officials whose names inadvertently were mentioned in the Select Committee's public hearings and were then discussed. Omitted names and information do appear in the confidential version of this report filed with the Senate Office of Classified National Security Information. Omissions of such sensitive information in this report are indicated by the designation "[deleted]."

CONTENTS

Page

Acknowledgments III

Explanatory Note Regarding Confidential and Sensitive Information V

Chapter One—Introduction 1

Chapter Two—The Select Committee's Investigation 7

Chapter Three—Summary of Findings by the Select Committee 11

- I. Benefits and Risks of Undercover Operations 11
- II. Abscam as an Illustration of the Benefits and Risks of Undercover Operations 12
- III. Allegations of Abscam Improprieties Not Proven 13
  - A. Allegations of Targeting 13
  - B. Specific Allegations of Injustice 14
  - C. Allegations Regarding Securities 14
  - D. Allegations Regarding Leaks 14
  - E. Allegations of Misconduct by the Informant 14
- IV. Principal Deficiencies in Abscam 15
  - A. Selection and Supervision of the Informant 15
  - B. Initial Approval of Abscam 15
  - C. Shifts in the Investigative Focus 16
  - D. Management and Supervision of the Operation 17
  - E. Misconduct by Informant 18
  - F. Reliance on Corrupt Middlemen 19
- V. The Complexity of Abscam Does Not Explain the Deficiencies 19
- VI. Department of Justice Conduct in Abscam 21
- VII. Leaks to News Media 22
- VIII. Need for Additional Controls on Undercover Operations 23

Chapter Four—Summary of Recommendation of the Select Committee 25

- I. Legislative Recommendations 25
  - A. Authorization and Reporting Requirements 25
  - B. Entrapment 27
  - C. Threshold Requirements for Undercover Operations 27
  - D. Indemnification 29
- II. Recommendations as to Guidelines 29
- III. Recommendation as to Administrative Directives 30
- IV. Recommendation for Administrative Policy 32
- V. Appropriations Recommendations 32
- VI. Concluding Observations 32

Chapter Five—The Attorney General's Guidelines 34

- I. A Brief History of FBI Undercover Activities 34
- II. Guidelines on Criminal Investigations of Individuals and Organizations 43
- III. Guidelines on FBI Use of Informants and Confidential Sources 45
  - A. General Provisions 45
  - B. Definitions 45
  - C. Suitability of an Informant 46
  - D. Required Instructions 47
  - E. Authorized Participation in Criminal Activity 47
  - F. Unauthorized Participation in Criminal Activity 47
  - G. Use of Informants and Confidential Sources Where Legal Privileges or News Media Involved 48
  - H. Compensation for Informants and Confidential Sources 48
  - I. Creation of Enforceable Rights 48

Chapter Five—The Attorney General's Guidelines—Continued

Page

IV. Guidelines for FBI Undercover Activities 49
  A. Origins 48
  B. Definitions 49
  C. Authorization of Undercover Operations 49
  D. Procedure for Approval Where the Director or Designated Assistant Director is Involved 50
  E. Undercover Operations Review Committee 51
  F. Approval by Director or Designated Assistant Director 54
  G. Duration of Operation 54
  H. Authorization of Participation in Otherwise Illegal Activities 54
  I. Authorization of Creation of Opportunities for Illegal Activity 54
  J. Monitoring and Control of Undercover Operations 55
  K. Emergency Authorization 55
  L. Investigative Interviews 55
  M. Crimes by Undercover Agents 55

Chapter Six—The Abscam Operation: An Example of the Benefits and Risks of a Long Term, Complex FBI Undercover Operation and a Demonstration of the Need for Modifications to Existing Statutes, Guidelines, and Operational Procedures 56
  I. Allegations of Targeting 57
    A. Targeting of Individuals by Name 57
      1. Individuals for Whom Videotaped Meetings Were Approved by FBI HQ 57
      2. Individuals for Whom FBI HQ Never Approved a Videotaped Meeting 63
    B. Targeting of Groups by References to Political Parties or Geographic Location 66
    C. Selection of Investigative Targets by Reliance Upon the Representations of Unwitting Middlemen 68
    D. Targeting of Congress as a Group—the Asylum Scenario 77
  II. Failures of Evidence Management 83
    A. Consensual Recording of Conversations with Suspects 83
      1. Failures to Record and to Memorialize Conversations 84
        (a) The number and nature of unrecorded calls 84
        (b) Recording instructions and equipment given to Weinberg 88
        (c) Gaps in tape recordings 90
        (d) Agents' failure to memorialize unrecorded conversations 93
        (e) Deficiencies in recovering, transcribing, logging and reviewing tapes 96
      2. Handling of Tape Recordings Received by the FBI 99
      3. Weinberg's Claim of Stolen Tapes 103
      4. Destruction of Audio Tape by an FBI Undercover Special Agent 107
    B. Other Logistical Evidentiary Failures 109
  III. Management, Supervision and Control of Weinberg 112
    A. Allegations that Weinberg Solicited and Received Gifts from Suspects During the Abscam Investigation 112
      1. The Defendants' Allegations 112
      2. Judicial Treatment of the Allegations 113
      3. Summary of Select Committee Findings 113
      4. The Errichetti gifts 114
        (a) The microwave oven 115
        (b) The RCA video recorder 117
        (c) The stereo system 119
        (d) The television sets 121
      5. The Katz Gifts 123
        (a) The three wristwatches 123
        (b) Liquor and Betamax video cassette recorder 127
      6. Other Gift Allegations 128
    B. Allegations that Weinberg Shared in Bribe Payments to Abscam Suspects 129
      1. The January 20, 1979, Payment to Errichetti 131
      2. The March 31, 1979, MacDonald Payment 138
      3. The Myers, Lederer, Thompson, and Murphy Payments 149

Chapter Six—The Abscam Operation—Continued Page

- C. Allegations of False Reporting by Weinberg Regarding Fraudulent Securities 152
  - 1. The Role of Fraudulent Securities Transactions in the Abscam Investigation 154
  - 2. The Rosenberg Securities Transactions 155
  - 3. The Errichetti Securities Transaction 163
  - 4. The Askeland FD 302 of January 26, 1979 167
  - 5. The Unsatisfactory Nature of the FBI's Practices Regarding Weinberg's Compensation for the Rosenberg Securities 169
- D. Misrepresentations by Weinberg Regarding Special Agent Denedy 170

IV. Specific Allegations of Injustice in the Operation 172

- A. Allegations that Several Abscam Defendants Were Induced to "Playact" 172
  - 1. The Defendants' Factual Allegations 173
  - 2. The Judicial Treatment of the Playacting Defense 174
  - 3. The Meaning of "Playacting" and "Coaching" 176
  - 4. An Evaluation of the Defendants' Factual Allegations Regarding Playacting, Coaching, and Related Conduct 178
    - (a) Events leading to the August 22, 1979, meetings 179
    - (b) The August 22, 1979 meetings 189
    - (c) The transaction with Representative Lederer 193
    - (d) The Noto incident 194
    - (e) Criden's transactions with other politicians in January 1980 195
    - (f) Representative Myers' activities in late January 1980 198
    - (g) Defendants' statements outside of the undercover operation 201
- B. Allegations Regarding the Investigation of Senator Harrison A. Williams 204
  - 1. Factual Predicate for Initiating the Investigation 206
    - (a) Initial FBI contact with the Senator's associates 206
    - (b) Continuation of the investigation 208
  - 2. Undue Pressure to Commit Crimes 216
  - 3. Coaching 229
  - 4. Size of the Inducement 235
  - 5. Deliberate Interruption of the Senator's Refusal of a Bribe 237
- C. Allegations Regarding the Investigation of Kenneth N. MacDonald 241
  - 1. Reasonable Suspicion Regarding MacDonald 242
  - 2. Ambiguities in the March 31, 1979, Transaction 253
  - 3. MacDonald's Awareness of the Purpose of the March 31 Meeting 257
  - 4. Prosecution of MacDonald by the Department of Justice 261
- D. Allegations that Videotaped Meetings with Representatives Thompson and Murphy were Deliberately Ambiguous 262
  - 1. Defendants' Allegations 262
  - 2. Judicial Decisions Regarding Defendants' Allegations of Deliberate Ambiguity 264
  - 3. Summary of Select Committee Conclusions 265
  - 4. The October 9, 1979, Meetings with Representative Thompson 267
  - 5. The October 20, 1979, Meeting with Representative Murphy 277
- E. Allegations Regarding the Edward Ellis Episode 285
- F. Allegations Regarding the Investigation of Bob Guccione 306

V. Miscellaneous Allegations of Impropriety 312

- A. Leaks to the News Media 312
- B. Allegations Regarding Injuries Caused by Joseph Meltzer 313
- C. Allegations Regarding Strike Force Chief Puccio's Relationships with Writers and Publishers 316
  - 1. Puccio's Initial Testimony 316
  - 2. The Origins of the Book Project 317
  - 3. The Contract 318
  - 4. Puccio's Awareness of the Contract 318
  - 5. Puccio's Select Committee Testimony 319
  - 6. *Brady* Violations 319

Chapter Six—The Abscam Operation—Continued Page
D. Allegations Regarding the Memorandum of January 6, 1981, by Deputy Assistant Attorney General Nathan 320
Chapter Seven—Other Undercover Operations of the Department of Justice 324
I. Frontload 324
II. Labou 329
III. Buyin 335
IV. Lobster 339
V. DEA and INS Operations 344
Chapter Eight—Recommendations for Legislation 347
I. A Recommendation for Legislation Authorizing Undercover Operations and Exempting FBI, DEA, and INS from Restrictions that Unduly Implede Effective Use of the Undercover Technique 347
A. Statutory Authority for Undercover Operations 349
B. Attorney General's Guidelines 350
C. Notice of Changes in Guidelines 351
D. Exemptions from Restrictive Laws 352
1. Procurement, Leasing, and Contracting 353
2. Proprietaries 355
3. Use of Income to Offset Expenses 356
4. Bank Deposits 358
5. Indemnification of Cooperating Parties 359
E. Annual Reports to Congress 360
II. A Recommendation for Entrapment Legislation 362
A. Existing Law 363
1. Entrapment 363
2. Due Process 367
B. Proposals for Reform 368
1. Elimination of the Entrapment Defense 369
2. Codification of Due Process Principles 370
3. An Objective Entrapment Standard 371
4. Entrapment Per Se 375
III. A Recommendation for Legislation Establishing Threshold Requirements for the Initiation of an Undercover Operation 377
A. Existing Law 379
B. The Intrusiveness of Undercover Operations 380
C. The Select Committee's Proposal for Reform 382
D. Explanation for the Select Committee's Rejection of a Judicial Warrant Requirement 387
IV. A Recommendation for Indemnification Legislation 389
A. The Nature of the Problem 390
1. Types of Injury 391
2. Existing Law 392
B. Proposed Legislation 393
V. Explanation for the Select Committee's Rejection of Proposals to Make Department of Justice Guidelines Judicially Enforceable 396
Appendices 399
Appendix A—Chronology of Abscam 399
Appendix B—Senate Resolutions Regarding the Select Committee and Rules of Procedure of the Select Committee 452
Appendix C—Correspondence Regarding the Select Committee's Access to Department of Justice Documents 472
Appendix D—Guidelines of Components of the Department of Justice 504
Appendix E—Legal Memoranda 601
Appendix F—Selected Cases of Criminal Prosecutions of Members of Congress, 1798-1981 682
Appendix G—Summary of Abscam Prosecutions Through September 1982 700

CHAPTER ONE—INTRODUCTION

In 1976, some 68 years after the creation of the Federal Bureau of Investigation ("FBI"),[1] the United States Department of Justice presented to Congress the first appropriation request expressly seeking funds for "undercover activities" [2] by the FBI. The request was for $1,000,000, exclusive of employees' salaries, related expenses, and equipment. Congress appropriated the requested sum for fiscal year 1977, and the FBI conducted 53 undercover operations that year. Since then, the number and cost of undercover operations have grown rapidly; in fiscal year 1981 the FBI conducted 463 undercover operations with $4.5 million appropriated for that purpose.

This sudden and dramatic change in the mix of investigative techniques used by this nation's premier law enforcement agency has evoked controversy among legal scholars, law enforcement officials, criminologists, civil liberties organizations, and members of the media. Thus, Gary T. Marx, a professor of sociology at the Massachusetts Institute of Technology, has warned:

> Some of the new police undercover work has lost sight of the profound difference between carrying out an investigation to determine whether a suspect is, in fact, breaking the law, and carrying it out to determine if an individual *can be induced* to break the law. . . . American society is fragmented enough without the Government's adding a new layer of suspiciousness and distrust. . . . Fake documents, lies, subterfuge, intrusive surveillance, and the creation of apparent reality are not generally associated with the United States law enforcement. However, we may be taking small but steady steps toward the paranoia and suspicion that characterize many totalitarian countries.[3]

Professor Alan Dershowitz of the Harvard Law School has concluded that

> The scam as a technique of law enforcement is now out of control. Every prosecutor, undercover investigator, and policeman . . . is free to conduct any scam he sees fit without fear of judicial rebuke. . . . The government cannot be allowed to select targets at will, expose them to

---

[1] In 1908 the Attorney General created within the Department of Justice a Bureau of Investigation, which in 1935 Congress statutorily designated the Federal Bureau of Investigation. *See generally* 28 U.S.C. §§ 531-535 (1976).

[2] As used in this report, an undercover activity or undercover operation is any investigation or inquiry by a law enforcement agency in which an employee of the agency, acting at its direction, conceals from another person his relationship with the agency.

[3] Marx, "Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work," *Crime & Delinquency*, April 1982, at 173, 191-92 (emphasis in original).

> all manner of temptation, and then pounce on those who succumb.[4]

On the other hand, James Q. Wilson, a professor of government at Harvard University, has defended the new emphasis on undercover operations:

> The Bureau has in fact changed, and changed precisely in accordance with the oft-expressed preferences of Congress itself. Congressional and other critics complained that the Bureau in the 1960's was not only violating the rights of citizens, it was wasting its resources and energies on trivial cases and meaningless statistical accomplishments. Beginning with Director Clarence Kelley, the Bureau pledged that it would end the abuses and redirect its energies to more important matters. This is exactly what has happened . . . .
>
> * * * * * * *
>
> New policies had to be stated, unconventional investigative techniques had to be authorized . . . [The Bureau needed] investigative techniques that could generate reliable evidence in large amounts without having to depend solely on an agent's ability to "flip" a suspect. One such method was the undercover operation.[5]

Similarly, Frank Tuerkheimer, United States Attorney for the Western District of Wisconsin, has stated:

> We have extraordinary constitutional restraints on the powers of government in enforcing criminal laws, restraints that are utterly alien to other law enforcement systems generally recognized to be within any acceptable definition of civility . . . . To the extent that a sting operation does not violate constitutional provisions and does not constitute entrapment of those involved, it is a legitimate law enforcement technique . . . . It is more reliable and less instrusive . . . than the alternatives; it represents a governmental commitment . . . to the application of the criminal laws to the wealthy and powerful.[6]

The controversy over undercover operations peaked in the wake of the public disclosure in February 1980 of the FBI undercover operation known as Abscam. Abscam resulted in jury verdicts criminally convicting a United States Senator, six Members of the United States House of Representatives, the Mayor of Camden, New Jersey, three members of the City Council of Philadelphia, Pennsylvania, an official of the United States Immigration and Naturalization Service, and an assortment of businessmen and lawyers.[7]

---

[4] Dershowitz, "Getting Stung," *Penthouse*, June 1982, at 148.

[5] Wilson, "The Changing FBI—The Road to Abscam," 59 *The Public Interest*, 3, 4, 5, 10 (1980).

[6] Tuerkheimer, "Sting Operations . . . A Necessary Tool," *Police Magazine*, May 1980, at 50.

[7] As of December 15, 1982, the date on which this report was submitted to the Senate, one Abscam trial, that of Joseph Silvestri, was still in progress. [Counsel's note: On December 21, 1982, Silvestri was convicted of conspiracy, bribery, and interstate travel violations.] A description of the Abscam prosecutions is provided in Appendix G to this report.

It also resulted, however, in findings by two United States District Court judges (one of whom has been reversed on appeal) that the investigative techniques used by the FBI violated the due process clause of the fifth amendment to the United States Constitution; [8] in excoriating criticism from media commentators such as syndicated columnist Jack Anderson and *Village Voice* writer Nat Hentoff; and in accusations by the wife of the FBI's key Abscam informant that he had defrauded the Department of Justice, had perjured himself in the Abscam trials and proceedings, and had compromised the integrity of several FBI special agents. Perhaps most seriously, several federal prosecutors who participated in the Abscam investigation have inveighed against the manner in which it and the resulting prosecutions were conducted. Former First Assistant United States Attorney Edward J. Plaza has in sworn testimony denounced Abscam as "a perversion of the truth" that "poses some of the most grievous threats to civil liberties." [9] Former United States Attorney William W. Robertson has concluded, "[I]nstead of insuring that potential exculpatory evidence was properly disclosed," ranking officials of the Department of Justice in Abscam "embarked on a course designed to obscure the information" and filed with a federal court a "false document" with intent "to dissemble." [10] Former United States Attorney Robert J. Del Tufo has found that Abscam "breached in many significant respects proper standards of professional responsibility as well as fundamental restraints and guidelines . . . ." [11]

The debate has not consisted of mere polemics; rather, both critics and defenders of undercover operations in general and of Abscam in particular have offered constructive suggestions for legislative changes. Thus, for example, Professor James Q. Wilson, a staunch supporter of the FBI and of its undercover operations, has suggested that undercover investigations of Congress.

> Be made subject to review in advance by the third branch of government. Before employing those techniques, the FBI would have to show a small panel of judges, in a private hearing, that it has reasonable grounds for its suspicions and that it has selected its targets on the basis of those reasonable suspicions and not on the basis of mere rumor or political disposition." [12]

More broadly, a George Washington University sociology professor, Amitai Etzioni, another staunch FBI supporter and a scathing critic of Congress, has suggested:

> In future sting operations, the FBI should take greater pains to control the behavior of [informants and unwitting

---

[8] The due process clause provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." *U.S. Const.* amend. V.

[9] FBI Undercover Operations: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) [hereinafter cited as House Jud. Subcomm. Hrg.], June 2, 1982, at 5 (testimony of Edward J. Plaza); House Jud. Subcomm. Hrg., June 9, 1982, at 40 (testimony of Edward J. Plaza) (citations to unpublished hearings are to transcript pages).

[10] House Jud. Subcomm. Hrg., Sept. 16, 1982 (written statement of William W. Robertson at 33).

[11] House Jud. Subcomm. Hrg., Sept. 16, 1982 (written statement of Robert Del Tufo at 10).

[12] Wilson, "The Real Issues in Abscam," *Washington Post*, July 15, 1982.

> middlemen]. . . . [Also,] we should . . . ask a small panel of judges to review all new sting techniques before they are employed. These judges could also help insure that sting operations are set up only for groups that can reasonably be considered suspect and do not turn into fishing expeditions among innocent citizens.[13]

Even more broadly, Professor Louis Seidman of the Georgetown University Law Center has suggested that Congress codify the guidelines currently used in FBI undercover operations;[14] prohibit the offering of inducements to subjects not reasonably suspected of criminal activity; bar government agents from committing, encouraging, or tolerating criminal acts of violence; outlaw the practice of supplying a subject with an otherwise unavailable item or service necessary to conduct a crime; and make violation of the codified guidelines an affirmative defense in any resulting criminal prosecution.[15]

Contemporaneously with these developments, Attorney General William French Smith has stated, "Clearly, Congress should itself review the propriety of federal law enforcement efforts—just as it should seek to improve the effectiveness of those efforts. This administration welcomes—and will join in—such an effort by the Congress."[16] Similarly, as long ago as April 20, 1978, the Director of the FBI, William H. Webster, stated, "The FBI urgently needs a clear and workable statement of its responsibilities, power, and duties."[17] Director Webster also has consistently urged Congress to exercise its oversight function regarding FBI undercover operations.[18]

On September 3, 1981, the Senate Select Committee on Ethics unanimously reported Senate Resolution 204 to expel Senator Harrison A. Williams for his conduct in violation of federal laws and Senate rules in the Abscam affair. The Senate began consideration of Senate Resolution 204 on March 3, 1982. After six days of debate on the Senate floor, on March 11, 1982, Senator Williams resigned his Senate seat.

---

[13] Etzioni, "Worry More About Our Crooked Pols," *Washington Post*, Sept. 19, 1982, at B2.

[14] On January 5, 1981, the Department of Justice published its first Attorney General's Guidelines on FBI Undercover Operations, which are currently in effect.

[15] *See* FBI Undercover Guidelines: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess., Pt. 1, at 15 (1981) (statement of Louis Seidman).

[16] Address by Attorney General William French Smith, Public Forum of the Association of the Bar of the City of New York (June 23, 1982).

[17] FBI Statutory Charter: Hearings Before the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 35 (1978) (statement of William H. Webster).

[18] *See* FBI Statutory Charter: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 135, 141 (1978) (testimony of William H. Webster).

In the course of those proceedings, the Senate gained familiarity with the Abscam investigation and with the allegations of governmental misconduct that had been leveled against the operation in the courts and in the press. Further, the proceedings highlighted differences between recent undercover operations and the FBI's more traditional investigative techniques, difficulties faced by the FBI in conducting undercover operations under existing statutes, and the risks, costs, and benefits of undercover operations. Some of that information had been adumbrated in hearings held in 1978 and 1979 by the Senate Committee on the Judiciary during its consideration of the proposed FBI Charter Act of 1979 and in FBI oversight hearings held by the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary in 1979 and 1980. Those sets of hearings, however, had addressed a broad range of matters, including the FBI's structure, administration, procedures, supplies, techniques, budget, and relationship with other federal, state, and local law enforcement agencies. Because of their breadth, those hearings could not study in depth the recent burgeoning of undercover operations and its effect on the balance between effective law enforcement and preservation of civil liberties.

Against that background, on March 25, 1982, the Senate agreed to Senate Resolution 350, establishing a Select Committee, consisting of four members of the majority party and four members of the minority party, to study the activities of components of the Department of Justice in connection with their law enforcement undercover operations and to recommend such legislation as the Select Committee might find necessary or desirable.[19] The resolution authorized and directed the Select Committee to conduct a comprehensive study of undercover operations, including the policies and practices governing their initiation, modification, management, supervision, direction, and termination; the policies and practices by which the Department of Justice targets particular individuals, coordinates among components of the Department of Justice, and manages, directs, and supervises undercover agents, employees, and informants; the effectiveness of undercover guidelines of the executive branch; and the issue of

> Whether the existing laws of the United States are adequate, either in their provisions or manner of enforcement, to safeguard the rights of American citizens, to accomplish appropriate executive branch and legislative branch control of such law enforcement undercover activities, and to give appropriate authorization for components of the Department of Justice to engage in law enforcement undercover activities.

---

[19] Senate Resolution 350 and the other resolutions regarding the work of the Select Committee are reprinted in Appendix B of this report.

The Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice ("the Select Committee") met for the first time on March 31, 1982, and appointed its counsel on May 5, 1982. Since then, as described in detail below, the Select Committee has conducted the investigation mandated in Senate Resolution 350. This is the final report of the results of that investigation, together with the findings and recommendations of the Select Committee.[20]

---

[20] Events following the creation of the Select Committee have further dramatized the need for a thorough consideration of the scope, nature, costs, and benefits of undercover operations. On November 4, 1982, *The Washington Post* reported that a group of agents of the Drug Enforcement Administration ("DEA"), acting undercover, had obtained evidence that another DEA undercover agent had been violating narcotics laws. A DEA official was quoted as having said, "We love to hang crooked cops." This event suggests that the pressures and temptations to which undercover agents can be subjected are substantial (a fact noted by many prominent sociologists, criminologists, and law professors), shows one manner in which undercover operations actually induce criminal activity, and indicates that one financial cost of undercover operations is the cost of hiring undercover agents to investigate other undercover agents.

Also, on November 7, 1982, *The Washington Post* reported that the Internal Revenue Service ("IRS") "is vastly expanding its intelligence and undercover activities and has created a special intelligence unit with unprecedented powers. . . . In addition, it is stepping up not only 'sting' operations but also the use of undercover agents posing as businessmen. . . ." Moreover, on September 21, 1982, an Immigration and Naturalization Service ("INS") official testified to the Select Committee that the INS is "increasing the undercover capacity and the undercover technique that we use." (Hearings before the Senate Select Comm. to Study Law Enforcement Undercover Activities of Components of the Department of Justice, 97th Cong., 2d Sess. (1982) [hereinafter cited as Sel. Comm. Hrg.], Sept. 21, 1982, at 72 (testimony of Humberto E. Moreno). Thus, increasing numbers of undercover agents are now being used from the FBI, the DEA, the INS, the IRS, and state and local governments. (The IRS, however, not being a component of the Department of Justice, is not within the scope of the Select Committee's study under Senate Resolution 350.)

CHAPTER TWO—THE SELECT COMMITTEE'S INVESTIGATION

The Select Committee began its investigation by studying constitutional provisions, statutes, regulations, guidelines, and judicial decisions governing important aspects of undercover operations. The most relevant constitutional provisions were the fourth amendment, governing searches and seizures, the fifth amendment's due process clause, the speech and debate clause, and the first amendment, governing freedom of speech. The statutes examined included the statutes creating and granting specified powers to the FBI, 28 U.S.C. §§ 531-537; statutes apparently restricting the techniques usable by the FBI, especially in undercover operations, 18 U.S.C. §§ 648, 1001 & 1005; 31 U.S.C. §§ 484, 521, 665 & 869(a); 40 U.S.C. §§ 34 & 35; 41 U.S.C. §§ 11(a), 22, 254(a) & (c), & 255; statutes governing the use of electronic surveillance, 18 U.S.C. §§ 2510-2520; and statutes governing crimes with which Abscam defendants were charged, 18 U.S.C. § 1952 (interstate travel in aid of racketeering); 18 U.S.C. § 371 (conspiracy to bribe public officials); 18 U.S.C. § 201(c) (bribery); 18 U.S.C. § 201(g) (illegal gratuity); 18 U.S.C. § 2 (aiding and abetting); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 2314 (interstate transportation of stolen property); 18 U.S.C. §§ 1961 *et seq.* (racketeer influenced and corrupt organizations); 18 U.S.C. § 203(a) (conflict of interest).

The judicial decisions examined included decisions of the United States Supreme Court and of lower courts interpreting the statutes described above and decisions governing the law of entrapment, electronic surveillance, consensual monitoring, due process aspects of criminal investigations, the rights of citizens injured by law enforcement activities to obtain compensation, searches and seizures by law enforcement officials, perjury, criminal discovery, and witness immunity. In addition, law review articles interpreting and analyzing such decisions were studied.

The guidelines and regulations examined included the United States Department of Justice Principles of Prosecution, published on July 28, 1980; the Attorney General's Guidelines on FBI Undercover Operations, published on January 5, 1981; the Drug Enforcement Administration Domestic Operations Guidelines, published on December 28, 1976; and amended on December 20, 1979; the Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations, published on December 2, 1980; the Attorney General's Guidelines on FBI Use of Informants and Confidential Sources, published on December 2, 1980; the Attorney General's Guidelines on Use of Informants in Domestic Security, Organized Crime, and Other Criminal Investigations, published on December 15, 1976; the Undercover Guidelines of the Southern Region, United States Immigration and Naturalization Service; and the Department of Justice regulations governing consensual monitoring and expenditures of a confidential character. To assist in interpreting and evaluating various guidelines, the Select Committee obtained from the Department of Justice and examined prior drafts of guidelines, memoranda criticizing and interpreting guidelines, documents reflecting the use of the undercover technique throughout the history of the FBI, and documents discussing difficulties faced by the FBI in conducting undercover operations under existing statutes.

The Select Committee also reviewed all hearings held by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary in 1978 on the development of an FBI statutory charter; all hearings held by the Senate Committee on the Judiciary in 1979 and 1980 on S. 1612, the FBI Charter Act of 1979; all hearings held by the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary from 1979 to 1982 on FBI oversight, on FBI undercover guidelines, and on a legislative charter for the FBI; portions of hearings held by the Subcommittee to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the Senate Committee on the Judiciary in 1980 on the inquiry into the matter of Billy Carter and Libya; and the Staff Report of the Senate Committee on the Judiciary in 1982 on the undercover investigation of Robert L. Vesco's alleged attempts to reverse a State Department ban preventing the export of planes to Libya.

To obtain further information regarding the history, nature, costs, and benefits of undercover operations, the Select Committee interviewed several FBI officials and took the testimony of William H. Webster, Director of the FBI; Francis M. Mullen, Jr., Executive Assistant Director of the FBI and Acting Administrator of the Drug Enforcement Administration; Oliver B. Revell, Assistant Director, Criminal Investigative Division of the FBI; Bob A. Ricks, Chief Counsel of the DEA; Humberto E. Moreno, Director, Office of Anti-Smuggling Activity, United States Immigration and Naturalization Service; John Kaplan, Professor of Law, Stanford University; Jerry Berman, Legislative Counsel, American Civil Liberties Union; Kenneth R. Feinberg, attorney; and Robert B. Fiske, former United States Attorney, Southern District of New York.

In addition to studying the general history, laws, policies, and procedures of undercover operations, the Select Committee studied seven specific undercover operations. Five of those operations had been conducted by the FBI. One had been conducted by the DEA. One had been conducted by the INS.

Examination of one of the FBI undercover operations, Abscam, consumed by far most of the time provided to the Select Committee in which to conduct its investigation. To familiarize itself with the issues and evidence in the Abscam judicial proceedings, the Select Committee reviewed nearly 40,000 pages of trial transcripts and due process hearing transcripts; reviewed scores of motion papers and appellate briefs; reviewed hundreds of trial exhibits; and read the several opinions issued by Abscam courts. To familiarize itself with criticisms of Abscam made by persons other than defendants in judicial proceedings, the Select Committee reviewed all Abscam columns written by syndicated columnist Jack Anderson and by investigative reporter Ralph Soda; reviewed the testimony given by former First Assistant United States Attorney Edward J. Plaza and by Assistant United States Attorney Robert A. Weir, Jr., before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary; reviewed the Abscam proceedings in the House of Representatives and in the Senate; and reviewed numerous articles and editorials in newspapers, magazines, and law reviews. The Select Committee then reviewed more than 20,000 pages of Abscam documents from the files of FBI Headquarters ("FBI HQ"), from the FBI's New York Field Office, from the FBI's Washington Field Office, from the FBI's Miami Field Office, and from other files of the Department of Justice. The Select Committee viewed several video tapes, listened to many audio tapes, and read hundreds of tape transcripts, all generated during the Abscam investigation. Attorneys from the Department of Justice provided oral summaries of several prosecution memoranda and of the nature and results of the investigation by the Department's Office of Professional Responsibility into various Abscam-related events in December 1980 and January 1981.

The Select Committee conducted interviews of Francis M. Mullen, Jr., Executive Assistant Director of the FBI and Acting Administrator of the Drug Enforcement Administration; Oliver B. Revell, Assistant Director, Criminal Investigative Division of the FBI; Michael Wilson, Assistant Section Chief, Personal and Property Crimes Section, Criminal Investigative Division of the FBI; Bob A. Ricks, Chief Counsel, Drug Enforcement Administration; John Good, Senior Supervisory Resident Agent, Hauppauge Resident Agency of the FBI; Special Agents Anthony Amoroso, Myron Fuller, John M. McCarthy, Gunnar Askeland, and Martin Houlihan; former Deputy Assistant Attorney General Irvin Nathan; former United States Attorney Charles Ruff, Department of Justice attorneys David Margolis, Gerald McDowell, William Bryson, and Reid Weingarten; former Assistant United States Attorneys Edward J. Plaza and John Kotelly; Assistant United States Attorney Stephen Spivack; former Strike Force Chief Thomas Puccio; Strike Force attorney Lawrence Sharf; former Strike Force attorney John Jacobs; Joseph DiLorenzo (nephew of Abscam defendant Angelo Errichetti); defense attorneys Richard Ben-Veniste and Samuel J. Buffone; and numerous other persons, such as hotel employees and bank employees.

The Select Committee held hearings at which it took the testimony of Abscam defendants William Rosenberg, Howard Criden, and Angelo Errichetti; Melvin Weinberg;[1] FBI Director William H. Webster; Francis M. Mullen, Jr.; Oliver B. Revell; John Good; Michael Wilson; Irvin Nathan; Thomas Puccio; John Jacobs; Bob A. Ricks; and Edward J. Plaza. The Select Committee reviewed the testimony and prepared statements of Robert J. Del Tufo, William

---

[1] The testimony of the first four individuals named in the text was taken in closed sessions of the Select Committee in order to protect innocent other persons, to avoid public disclosure of lawful but sensitive FBI investigative techniques, to avoid the public disclosure of any document of the Department of Justice the confidentiality of which the Select Committee has agreed to preserve, and to avoid possible prejudice to the judicial proceedings that were then pending. The transcripts of those closed sessions will be printed with the public hearings, with such confidential and sensitive information redacted. Citations to the Select Committee's hearings in this report refer to pages of transcript testimony. The published hearings will be paginated similarly for convenience.

W. Robertson, Justin P. Walder, Edward J. Plaza, Robert A. Weir, Jr., Irvin Nathan, former Assistant Attorney General Philip A. Heymann, William H. Webster, Richard Ben-Veniste, Michael Tigar, and several alleged victims of Joseph Meltzer, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary.

Finally, the Select Committee reviewed the full confidential report prepared by Richard Blumenthal, former United States Attorney for the District of Connecticut, regarding the investigation he conducted to determine the sources and causes of the massive leaks of Abscam information to the media in early 1980. The Select Committee determined that, even if its time and budgetary restraints were to be relaxed, it could not significantly add to the excellent investigation and report by Blumenthal and his staff.

The Select Committee's study of other undercover operations was necessarily more limited. For FBI Operation Buyin, the Select Committee reviewed all files in FBI HQ and all files in the Seattle Field Office, and in a public hearing took the testimony of Oliver B. Revell and of J. Harper Wilson, Unit Chief, Organized Crime Section, Criminal Investigative Division, FBI. For FBI Operation Lobster, the Select Committee reviewed all files in FBI HQ and all files in the Boston Field Office, and in a public hearing took the testimony of Oliver B. Revell and of Richard D. Schwein, Assistant Special Agent in Charge of the Cleveland Field Office, FBI. For FBI Operation Labou, the Select Committee reviewed selected files from FBI HQ and from the Washington Field Office, and in a public hearing took the testimony of Oliver B. Revell and of Bob A. Ricks. For FBI Operation Frontload, the Select Committee reviewed selected files from FBI HQ, and in a public hearing took the testimony of Oliver B. Revell and of James W. Nelson, Unit Chief, Organized Crime Section, Criminal Investigative Division, FBI. For DEA Operation Scorpion, the Select Committee reviewed selected files of the DEA, and in a public hearing took the testimony of Bob A. Ricks. For the INS operation studied, the Select Committee reviewed files of the INS, and in a public hearing took the testimony of Humberto E. Moreno, Director, Office of Anti-Smuggling Activity, U.S. Immigration and Naturalization Service.

CHAPTER THREE—SUMMARY OF FINDINGS BY THE SELECT COMMITTEE

I. BENEFITS AND RISKS OF UNDERCOVER OPERATIONS

The Select Committee finds that undercover operations of the United States Department of Justice have substantially contributed to the detection, investigation, and prosecution of criminal activity, especially organized crime and consensual crimes such as narcotics trafficking, fencing of stolen property, and political corruption. In this era of increasingly powerful and sophisticated criminals, some use of the undercover technique is indispensable to the achievement of effective law enforcement. Of course, the need for some use of the undercover technique does not dictate how many undercover operations are necessary or desirable—the 53 conducted by the FBI in 1977, the 463 conducted in 1981, or some other number—or what safeguards should attend their use.

The Select Committee also finds that use of the undercover technique creates serious risks to citizens' property, privacy, and civil liberties, and may compromise law enforcement itself. Even when used by law enforcement officials with the most honorable motives and the greatest integrity, the undercover technique may on occasion create crime where none would otherwise have existed. It may lead a government agent to offer an illegal inducement to a person who has never previously committed a crime and who is not predisposed to do so; cause innocent persons to suffer harm to their reputations or to their property; undermine legitimate expectations of privacy; subject law enforcement agents to unaccustomed temptations, dangers, and stresses; undermine the cohesiveness, effectiveness, and value of civic and political organizations; and create an atmosphere of distrust, in which public officials and private citizens must act with some concern for the possibility that colleagues and acquaintances are not who they seem to be, but are agents or informers of the federal, state, or local government. These dangers assume even more importance in undercover operations managed or conducted by agents or officials whose zeal, ambition, or baser motives distort their judgment about the proper role of law enforcement in a democratic society.

Accordingly, the Select Committee finds that the central task of those who recognize both the efficacy and the danger of the undercover technique is to create a system of statutes, guidelines, and rules that, avoiding both the tyranny of unchecked crime and the tyranny of unchecked governmental intrusion, provides the public with the optimal balance between effective law enforcement and the preservation and nurturing of civil liberties. This the existing system fails to do, even with respect to the FBI, which, to the Select Committee's knowledge, has done far more than any other federal, state, or local law enforcement agency to adopt policies and procedures designed to achieve that balance.

Existing statutes neither adequately empower the FBI to engage in activities crucial to the success of many undercover operations nor adequately ensure that undercover operations will be no more harmful or intrusive than is necessary and desirable. Existing guidelines, policies, practices, and procedures of the FBI, while greatly improved in almost every year since 1975, continue to create an unnecessary risk of harm and abuse.

The situation with respect to other law enforcement agencies within the Department of Justice is considerably worse. The Drug Enforcement Administration, for example, has guidelines much less complete than those of the FBI, and the Immigration and Naturalization Service has none.

II. Abscam as an Illustration of the Benefits and Risks of Undercover Operations

The Select Committee finds that the FBI undercover operation known as Abscam paradigmatically demonstrates many of the benfits, dangers, and costs of the undercover technique. Abscam resulted in the conviction of numerous elected and appointed officials, confidence men, businessmen, and lawyers and in the recovery of millions of dollars of fraudulent securities. Nine separate juries heard the testimony of witnesses, saw videotapes, and read documents; each of those juries found guilty each of the Abscam defendants who appeared before it.[1] All appellate courts to date that have reviewed those convictions have found them to have been achieved without any violation of the defendants' constitutional rights. Abscam's successes are likely to deter public officials in the future from readily selling their offices for private gain. Such results could not have been obtained without the use of undercover techniques.

On the other hand, the absence during the Abscam investigation of Department of Justice guidelines governing undercover operations, the laxness of the guidelines then in existence governing the use of informants, the failure of the special agents assigned to Abscam in the field to review, to catalogue, and to report recordings and other evidence in a timely and otherwise adequate manner, and the absence of rigorous requirements to keep officials at FBI HQ adequately informed about the nature of and developments in undercover operations created unnecessary and undue risks in Abscam. Some of those risks materialized into real problems, as described later in this report. Other risks remained only latent in Abscam, but are matters for concern in future operations.

The Select Committee finds that, although the FBI's policies, practices, and procedures during the Abscam investigation created unnecessary and undue risks, several of the deficient policies, practices, and procedures have been improved since 1979, and especially since the promulgation in 1980 and 1981 of formal guidelines governing criminal investigations, undercover operations, and the use of informants and confidential sources. The Select Committee fully agrees with Director Webster's testimony that "[t]here has been much progress in the last four years as we [the FBI] developed institutional awareness of problem areas and methods to deal with them." (Sel. Comm. Hrg., Sept. 30, 1982, at 15 (testimony of William H. Webster).) Several of the mistakes and deficiencies that characterized the Abscam investigation would be less likely to occur under the system now in place.

---

[1] The trial of defendant Joseph Silvestri was in progress on December 15, 1982, the date this report was submitted. [Counsel's note: On December 21, 1982, Silvestri was convicted of conspiracy, bribery, and interstate travel violations.]

III. ALLEGATIONS OF ABSCAM IMPROPRIETIES NOT PROVEN

The Select Committee emphasizes that it makes its findings with respect to Abscam on the basis of the preponderance of the evidence it has examined. These findings reflect an attempt to ascertain the benefits and risks that attend the use of the undercover technique generally and to determine which of them materialized in this major FBI investigation. In particular, the Select Committee has not attempted to perform the functions of adjudicating criminal defendants' guilt or innocence, determining whether they were entrapped, or deciding whether their due process rights were violated. Those functions are properly reserved to the judicial branch of government.

Accordingly, in performing its functions the Select Committee was not bound by, and did not follow, the panoply of constitutional and statutory provisions and procedural rules that govern criminal prosecutions. For example, individuals as to whom adverse findings have been made in this report were not afforded an opportunity to cross-examine witnesses; findings against them have not been made by applying a standard requiring proof beyond a reasonable doubt; and judicial rules governing the admissibility of evidence were not employed. Because of its consideration of evidence inadmissible in judicial proceedings, and because of the procedures by which it took evidence, the Select Committee concludes that its factual findings cannot and should not properly affect in any way the course of any pending criminal case.

The Select Committee finds that several of the allegations, made by defendants, by members of the media, and by other Abscam critics, of illegality and of other impropriety in the Abscam investigation are not supported by a preponderance of the evidence.

A. Allegations of targeting

1. None of the individuals who attended videotaped meeting with FBI undercover operatives had been targeted by the FBI before his name had been raised by an unwitting middleman.[2]

2. The FBI did not abandon or fail to follow any investigative lead for any improper purpose. A contingent bribe offer was approved for every public official who a middleman had said was willing to take a bribe at a specific time and place.

---

[2] For problems with respect to the targeting of public officials who never attended any meeting with Abscam undercover operatives, however, see pp. 60–61 *infra*.

B. Specific allegations of injustice

1. None of the Abscam defendants was merely playacting. Specifically, no public official who received money or other valuable consideration directly or indirectly from an FBI undercover agent did so with the intent of simply defrauding a sheik; rather, each public official who received money directly or indirectly from an FBI undercover agent understood that the payment was a bribe. Each middleman who induced a public official to meet with an FBI undercover agent understood that the purpose of the meeting was to enable the official to receive a bribe.

2. No public official who attended a videotaped meeting at which an FBI undercover agent transferred money to the public official or to a middleman believed that the payment was being made for a purpose unrelated to him and to his public office; rather, each public official who attended such a meeting at which an FBI undercover agent transferred money to the public official or to a middleman believed that the payment was being made because of his presence and because representations had been made, by him or on his behalf, to cause the payor to believe that the public official would, if necessary, use his influence as a public official to assist the payor or the payor's principal.

C. Allegations regarding securities

1. Weinberg did not provide William Rosenberg or Angelo Errichetti with blank fraudulent securities to be filled in by them, returned to Weinberg, and fraudulently reported by him to the FBI as having been produced by Rosenberg and Errichetti.

2. Weinberg did not fraudulently provide Errichetti with a sample fraudulent certificate of deposit to enable Errichetti to have additional such securities produced. Weinberg did provide such a sample to Errichetti, but did so with the knowledge and approval of FBI special agents.

D. Allegations regarding leaks

The massive leaks of Abscam information to the media in early 1980 did not result from any reasonably curable deficiency in the policies and procedures of the FBI or of any other Justice Department component. Specifically, there is no evidence that these leaks were politically motivated.

Other allegations of impropriety rest almost exclusively on the statements of middlemen and others implicated in criminal activity. Those witnesses have an obvious interest in undermining the validity of the Abscam investigation. Much of their testimony on these allegations was internally inconsistent, far-fetched, evasive or noticeably vague. Accordingly, the Select Committee finds the following:

E. Allegations of misconduct by informant

1. There is insufficient evidence to conclude that Weinberg and Errichetti held a clandestine meeting on January 6, 1979, to begin to "indoctrinate" Errichetti or for any other purpose. To the contrary, it appears that no such meeting occurred.

2. There is insufficient evidence to conclude that Errichetti paid Weinberg any part of the $25,000 bribe payment made to Errichetti on January 20, 1979.

3. There is insufficient evidence to conclude that Weinberg solicited and received gifts, other than those described below at page 18, or that he solicited and received loans that he has not repaid. Specifically, the Select Committee has insufficient evidence to determine whether Weinberg received a video cassette recorder, a Seiko watch, an ounce of gold, or cash from Errichetti; loans from William Rosenberg and William Eden; or cash and miscellaneous items from Alfred Carpentier.

IV. Principal Deficiencies in Abscam

The Select Committee finds that the principal mistakes and deficiencies that occurred in Abscam are as follows:

A. Selection and supervision of the informant

1. Without reviewing the informant file of Melvin C. Weinberg, a criminal whom FBI HQ had previously ordered terminated as an informant because of his commission of felonies while he had been an informant, and without discussing with anyone the wisdom of or need for special controls, and without obtaining approval from FBI HQ, FBI special agents in the field decided to use Weinberg as an informant.

2. For nearly five months (February-July 1978), FBI special agents in New York conducted a multi-state undercover operation, allowing Weinberg to engage in informant activities 1,500 miles from his principal contact agent, from the case supervisor, and from the prosecuting attorneys assigned to the case. Moreover, this was done without approval from FBI HQ, despite the existence of an FBI policy requiring FBI HQ approval for any undercover operation likely to require the expenditure of more than $1,000 or to last for longer than six months, and despite the clear likelihood that the Abscam investigation would exceed both of those limits.

3. The FBI extensively used the Abscam informant, Abscam agents, and Abscam facilities simultaneously in two major undercover operations (Abscam and Goldcon) and peripherally in two others (Palmscam and the Southwest Sewer District investigation). This overlap clouded the responsibilities of special agents working with the informant, created conflicting instructions to the informant, made it difficult to ascertain which of the informant's activities were conducted pursuant to which operation, increased the risk that the informant could and would engage in criminal or otherwise improper conduct, and made it likely that evidence relevant to more than one operation would not be properly recorded or disseminated.

B. Initial approval of Abscam

1. The only application for FBI HQ approval of Abscam, submitted on May 26, 1978, contained no description of the informant, Melvin C. Weinberg, or of his background, reliability, or suitability for a long-term, multi-state undercover operation. The application did not discuss how or by whom he would be monitored, controlled,

or supervised. It contained no evaluation of the experience and suitability of the several special agents being used in the operation. It did not mention the risks of physical harm, of property loss, of invasions of privacy, of interference with confidential relationships, and of other possible untoward consequences. And it contained no detailed description of evidence justifying the proposed investigation.[3]

2. The May 26, 1978, application for approval of Abscam submitted by the FBI's New York Field Office to FBI HQ listed such a broad range of investigative objectives—recovering stolen and counterfeit securities; obtaining access to unspecified phony financial dealings in Las Vegas, Nevada; obtaining access to unnamed underworld activities in Atlantic City, New Jersey; gaining "intelligence information" on unnamed New York underworld figures; recovering unspecified stolen artifacts in Florida and in other, unspecified locations; and opening "almost any door in the United States" with respect to stolen securities, rare art, or unspecified "other stolen property"—that from its inception Abscam was virtually unlimited in geographic scope, persons to be investigated, and criminal activity to be investigated. Approval of this application was, in practical effect, a license for several special agents to assume false identities, to create a false business front, and to see what criminal activities could be detected or developed throughout the country. The application in Abscam's sister operation, Goldcon, was even broader.

C. Shifts in the investigative focus

1. The investigative focus of Abscam began to shift in September and October 1978 from property crimes to political corruption, in large part as a result of Weinberg's conversations with suspects. FBI special agents knew of at least some of Weinberg's conversations in that regard sometime before November 16, 1978, but failed to inform FBI HQ, to discuss the need for a basis to begin a political corruption investigation, or to exercise greater control over Weinberg.

2. Although Abscam came to focus almost entirely on political corruption, no application for approval of the shift from an investigation of property crimes was ever submitted to FBI HQ.[4]

3. Although Abscam came to focus on the "asylum scenario" and on an investigation of political corruption in Congress specifically, no application for approval of the new scenario or of the attempt to detect corruption in Congress was ever submitted to FBI HQ.

4. Weinberg articulated the "asylum scenario" in a conversation with suspect George Katz on July 14, 1979. Shortly thereafter, Weinberg discussed at least the broad outline of that scenario with FBI Special Agent Anthony Amoroso, but neither Amoroso nor

---

[3] The dearth of information in the Abscam application was in marked contrast to the documents submitted to FBI HQ by the FBI's Boston Field Office in connection with Operation Lobster a year earlier. In Operation Lobster the Boston Field Office gave FBI HQ detailed information, including statistics, about evidence of the existence of the type of crime being investigated, about the basis for suspecting specifically identified persons of specified criminal conduct, and about the recommended undercover agent's "credibility and suitability for the . . . operation."

[4] This failure was in marked contrast to the preferable practice by the FBI's Boston Field Office in Operation Lobster a year earlier, in which the Boston Field Office informed FBI HQ by teletype of new "avenues of approach being developed," of intentions to expand the operation geographically, of intentions to include new targets in the investigation, and of intentions to use new investigative techniques.

anyone else in the New York Field Office promptly informed FBI HQ of the scenario or of Weinberg's use of the scenario on July 14, 1979. Evidence suggests that the FBI special agents assigned to Abscam did not even listen to the recording of the July 14, 1979, conversation until after the Abscam investigation had ended.

D. Management and supervision of the operation

1. Weinberg failed to record conversations with criminal suspects at important meetings, including meetings with Mayor Angelo Errichetti on January 19, March 30, and August 22, 1979. The FBI special agents assigned to Abscam, who knew in advance of the March 30 and August 22 meetings, neither debriefed Weinberg nor prepared a written report of the occurrence, much less the substance, of those meetings. At least as to the meetings of August 22 and March 30, 1979, the failure to prepare a written report violated FBI policies existing then and now. Weinberg never reported the January 19, 1979, meeting and, until Abscam prosecutors confronted him with a telephone charge record showing that he had been at the site of the meeting, refused to acknowledge that it had occurred.

2. The FBI neither promptly transcribed all audio tapes[5] obtained in Abscam nor required Weinberg to provide on a daily basis the tapes he made of conversations he had with suspects. The FBI special agents also did not promptly listen to all tapes provided by Weinberg and in some instances did not listen to tapes until months after the recorded conversations occurred. Decisions as to which tapes to hear were made in part on the basis of what Weinberg told the special agents about the tapes. Many of the transcripts that were prepared are rife with transcription errors, several of which are material and could easily have been detected by anyone knowledgeable about the case. As a result, special agents and supervisory personnel failed to obtain prompt, accurate, and full knowledge of what Weinberg was saying to criminal suspects.

3. The FBI did not number and put identifying marks on recording tapes before giving them to Weinberg and did not keep any log of which tapes were returned by him on what dates.[6] This omission prevented the FBI, and subsequently the courts and the Select Committee, from knowing how many tapes may have been lost, destroyed, or withheld.

4. FBI special agents in New York allowed numerous unrecorded telephone calls to be made to and from the offices of the FBI's business front, Abdul Enterprises, even when the conversations were with criminal suspects.[7]

5. Weinberg made and received numerous unrecorded telephone calls, on telephones not at Abdul Enterprises, to and from criminal suspects. The FBI special agents assigned to Abscam debriefed Weinberg and prepared a written report of the debriefing with re-

---

[5] This was in marked contrast to the Boston Field Office's practice in Operation Lobster.

[6] This was in contrast to the Boston Field Office's treatment of tapes in Operation Lobster.

[7] In Operation Lobster in the Boston Field Office, the general practice was to record all telephone calls to and from the business front and, when recordings were not made, to write memoranda explaining why recordings were not made.

spect to fewer than a dozen such conversations during the 18 months in which Abscam operated with the approval of FBI HQ.[8]

6. During the first 12 months of the Abscam investigation (February 1978 to February 1979), written and oral communications between FBI special agents in Florida working with Weinberg and FBI special agents in New York working with Weinberg were unduly sporadic and sparse. Neither the New York nor Miami Field Offices communicated adequately with FBI HQ.

7. Especially in the first 12 months of the Abscam investigation, the FBI's New York and Miami Field Offices provided unduly sparse and sporadic information to FBI HQ.[9]

E. Misconduct by informant

1. Weinberg obtained a $5,000 bonus from the FBI on April 9, 1979, in part by misrepresenting to Special Agent John M. McCarthy the facts surrounding the appearance of Special Agent Margot Denedy's picture in newspapers on January 29, 1979. This was made possible in part by Weinberg's failure to record all telephone conversations with key criminal suspects Angelo Errichetti and William Rosenberg.

2. The weight of the evidence indicates that Weinberg solicited and received from criminal suspects valuable gifts, which he converted to his personal use. On or about January 19, 1979, Weinberg received from Mayor Angelo Errichetti a General Electric microwave oven. In early April of 1979, Weinberg received from Errichetti a stereo system, which included a Harman-Kardon receiver, two Genesis speakers, and other components. In the summer of 1979, Weinberg received from Errichetti three Sony Trinitron color television sets. In December 1979 Weinberg received from businessman George Katz liquor worth approximately $2,000 and a Sony Betamax video cassette recorder.

3. Weinberg failed to disclose to the FBI his solicitation or receipt of these gifts and, when confronted, falsely denied to government attorneys and agents that he had solicited or received them.

4. When he testified under oath before grand juries, in trial court proceedings, and before the Select Committee, Weinberg falsely denied that he had solicited and received these gifts.

5. The weight of the evidence indicates that on April 1, 1979, Weinberg met with Angelo Errichetti and received a portion of the $100,000 bribe payment given to Errichetti in the presence of Kenneth MacDonald by Special Agent McCarthy on March 31, 1979. Weinberg failed to inform the FBI of the meeting or of his receipt of the money and, when later interviewed by government attorneys, falsely denied having met Errichetti on April 1, 1979, and having received any money from Errichetti. Further, in subsequent court proceedings and in his testimony before the Select Committee, Weinberg under oath falsely repeated both denials.

---

[8] In Operation Lobster in the Boston Field Office nearly 300 written reports of telephone calls between April and September of 1978 were prepared and nearly 500 such summaries of telephone calls between August and November of 1978 were prepared.

[9] This is in sharp contrast to the Boston Field Office's practice in Operation Lobster, in which FBI HQ received biweekly summaries of the operation describing recent uses of technical equipment, recoveries of property, administrative developments, and new cases.

6. On April 1, 1979, Weinberg created a tape recording on which he first recorded his own statement that the time was 2:30 p.m. and then recorded a conversation with Angelo Errichetti that occurred at 4:53 p.m. The misleadingly constructed tape made it sound as though Weinberg had called and spoken with Errichetti at 2:30 p.m. on April 1, 1979. Weinberg provided that tape to the FBI on April 1 or 2, 1979, without revealing the time at which the conversation with Errichetti had actually occurred. The weight of the evidence indicates that Weinberg intended to mislead the FBI and to conceal the fact that he had met with Errichetti on April 1. His ruse succeeded. On April 2, 1979, Abscam special agents in New York informed FBI HQ that Weinberg had spoken by telephone with Angelo Errichetti on April 1, 1979, at 2:30 p.m.

F. Reliance on corrupt middlemen

The FBI's consistent practice in Abscam was to rely, in approving bribe offers, upon the representations of middlemen that specified public officials would accept bribes. Some of those representations were often uncorroborated in every sense of the word: The FBI had no extrinsic evidence that the named public official had previously accepted or solicited a bribe or had committed any other crime, and the FBI had no extrinsic evidence that the middleman knew the public official well enough to know whether his own representations about that public official were true. In some cases, the FBI relied on the representations of a middleman with no record of reliability for producing corrupt public officials. In some cases the FBI continued to rely on middlemen even after they had proved to be unreliable in this regard. As a result of the FBI's unduly unquestioning reliance on middlemen, at least one (and apparently more) clearly innocent public official was brought before the hidden cameras.

V. THE COMPLEXITY OF ABSCAM DOES NOT EXPLAIN THE DEFICIENCIES

The Select Committee finds that the deficiencies in the management, supervision, and control of Abscam and the stark differences between the practices in that operation and those followed in other undercover operations—notably, by the Boston Field Office in Operation Lobster—cannot be excused on the basis of the complexity of the Abscam investigation. Abscam did not entail coordination between federal prosecutors from New York and New Jersey until March 1979, a full year after the operation began. Videotaping did not begin until February 12, 1979. No Member of the House of Representatives was offered a bribe until August 22, 1979. Abscam did not require coordination with attorneys and FBI special agents from Philadelphia and Washington, D.C., until even later. The FBI did not designate the operation a "Bureau Special" until the fall of 1979. Yet the deficiencies that characterized these latter, more complex stages of the operation fully characterized the first year of the operation, as well.

From the operation's inception, tapes were not premarked for identification and control, retrieved daily, promptly and accurately transcribed, listened to by special agents or by Strike Force attorneys, or logged and summarized. Other evidence, such as fraudulent securities, was obtained without being reported in a manner that revealed the circumstances under which it had been obtained. Memoranda were prepared making misstatements about dates, participants, and subject matter of material events. Numerous telephone conversations, even on telephones at the FBI business front equipped with sophisticated electronic monitoring equipment, went unrecorded and unmemorialized. Neither monthly nor biweekly reports were sent to FBI HQ. The informant made and received numerous telephone calls and attended meetings as to which he was not debriefed or as to which no report was made of the debriefing. None of these deficiencies occurred in Operation Lobster, even during its most hectic and complex stages. The facts, therefore, do not support the FBI's contention that Abscam was more loosely run than Lobster because of Abscam's greater complexity.

The Select Committee finds that the deficiencies occurred in Abscam primarily for two reasons. First, at that time FBI HQ did not impose rigorous investigative and recordkeeping requirements on undercover operations. Second, the Abscam agents exhibited disregard for careful reporting and recordkeeping practices and for procedural safeguards.[10]

The Select Committee also finds untenable the FBI's contention that Abscam's defects can be excused by the demands placed upon the Abscam special agents and supporting staff by the magnitude and duration of the operation. There is no question that extraordinary demands were placed on some of the Abscam operatives, that the resources of the Hauppauge Resident Agency were severely taxed, and that the conditions were arduous. If, however, as FBI officials have stated, more secretarial resources were needed to transcribe tapes; if more agents were needed to retrieve, listen to, log, and report tapes on a prompt basis; if more recording equipment was needed (as Special Agent Amoroso told the Select Committee); if more recording tapes were needed (as Melvin Weinberg testified before the Select Committee); and if equipment and personnel were overburdened, those problems should have been made known to or discovered by FBI HQ, and either the deficiencies should have been remedied, or the scope of the operation should have been reduced.

A law enforcement agency should not, as has been done since 1976, expand the number and scope of its undercover operations so greatly and so rapidly that major sensitive operations are conducted in a manner that markedly increases the risk of error. If the FBI believes that more, and more expensive, undercover operations are necessary and desirable (which may well be the case), that position should be articulated and justified in requests for appropriations sufficient to implement the operations properly. If the requests are denied, the denial should be interpreted not as a mandate for many poorly run operations, but for fewer and better run operations.

---

[10] If an undercover operation is more complex, it will, *ceteris paribus*, create more risk of error, of infringement of civil liberties, and of prosecutorial difficulties. Accordingly, procedural safeguards should be even more strictly followed in the more complex operations.

VI. Department of Justice Conduct in Abscam

The Select Committee further finds that, from March 1979 to the termination of the covert phase of the Abscam investigation in February 1980, ranking officials in the Department of Justice gave far more attention to Abscam than customarily had been given to an investigation in progress in the field. Nevertheless, too little was done at an early enough stage to manage, supervise, direct, and coordinate the activities of the several prosecutorial offices that were participating: the Strike Force for the Eastern District of New York; the Strike Force for the District of New Jersey; the United States Attorney's Office for the District of New Jersey; the United States Attorney's Office for the Eastern District of Pennsylvania; and the United States Attorney's Office for the District of the District of Columbia. As a result, throughout the covert investigation and the subsequent prosecutions, Thomas Puccio, Chief of the Organized Crime Strike Force for the Eastern District of New York, was able to hinder the efforts of other prosecutors to stay abreast of and to participate fully in developments in the investigation and prosecutions. Puccio was peculiarly unreceptive to suggestions, criticisms, and requests of other prosecutors working on Abscam. He also interpreted directives from officials in the Department of Justice in the narrowest possible fashion so as to retain for himself maximum control of all aspects of Abscam. The difficulties that thus developed were exacerbated by the critical attitude adopted by federal prosecutors from New Jersey from their initial involvement in March 1979 and by their clearly expressed desire to direct the New Jersey portion of the Abscam investigation.

By the time the covert stage had ended on February 2, 1980, strong personal animosities had developed between the New Jersey federal prosecutors and the New York federal prosecutors and between the New Jersey federal prosecutors and the FBI's Abscam operatives, including the informant. Under these trying circumstances, officials in the Department of Justice generally performed well in the prosecutorial phase. Approximately 20 potential political corruption cases had to be evaluated; investigative grand juries in several districts had to be convened and coordinated; indictments had to be sought from grand juries where appropriate; defenses, including due process and entrapment, had to be anticipated, investigated, and evaluated. All this had to be accomplished quickly enough to avoid the actuality or the appearance of delaying the disposition of the cases for so long that they would affect the impending political primaries and elections. Meanwhile, massive leaks of information to the media at the end of the covert investigation had already generated criticism and pressure to achieve a rapid judicial resolution of the cases.

The Select Committee finds that the actions of then Assistant Attorney General Philip B. Heymann and then Deputy Assistant Attorney General Irvin Nathan with respect to the January 6, 1981, memorandum by Nathan regarding the December 17, 1980, memorandum by New Jersey federal prosecutors Edward J. Plaza and Robert A. Weir, Jr., were in part commendable and in part unjustifiable. Heymann and Nathan acted commendably in deciding to furnish to Abscam defense counsel several recording tapes that the

Plaza-Weir memorandum described as exculpatory but that the principal Abscam prosecutor, Thomas Puccio, had then reviewed and had found to be non-exculpatory. Similarly, Heymann and Nathan acted commendably in deciding to furnish to Abscam defense counsel a summary of contentions in the Plaza-Weir memorandum that Plaza and Weir believed would assist the defendants, even though Heymann and Nathan believed those contentions to be non-exculpatory, and even though Plaza and Weir had not expressly urged in their memorandum that those contentions be furnished to defense counsel.

The Select Committee further finds that, although the Nathan memorandum contains one ambiguous reference, the memorandum's summary of the contentions in the Plaza-Weir memorandum is accurate in every material respect and provided defense counsel with names, dates, and references sufficient to enable defense counsel to pursue the matter.

The Select Committee further finds, however, that the decision by Heymann and Nathan to publish to defense counsel and to the courts the prefatory portion of the Nathan memorandum, which discusses background information and internal departmental criticisms that, when published, were sure to harm the reputations of Plaza and Weir, was unjustifiable. That decision was especially injudicious because the Nathan memorandum stated that Plaza and Weir had done "very little, if any, work" on the cases that had been assigned to them. In fact, they had done a substantial amount of work; but, by failing to convene an investigative grand jury, they simply had not taken a major step that Heymann and Nathan had thought appropriate.

VII. Leaks to News Media

The Select Committee finds that harm to the privacy and reputations of unquestionably innocent individuals resulting from Abscam was compounded by massive leaks of confidential information that could have come only from persons, within the FBI or within other components of the Department of Justice, acting in flagrant violation of regulations and professional obligations. An extensive internal investigation of those leaks was conducted by the Department of Justice, and disciplinary sanctions were imposed for some infractions. The Select Committee reviewed both the public report and the confidential report of that investigation and finds no basis on which to question its adequacy. Unfortunately, that investigation did not result in the identification of anyone responsible for the most serious leaks.

The Select Committee also finds that the leaks did not result from any reasonably curable deficiency in the policies, practices, or procedures of the FBI or of any other component of the Department of Justice. Rather, the leaks provide a dramatic example of the irreducible risk of harm that will exist whenever a law enforcement agency follows procedures that may induce corrupt middlemen to make baseless inculpatory representations about innocent private citizens or public officials.

VIII. NEED FOR ADDITIONAL CONTROLS ON UNDERCOVER OPERATIONS

The Select Committee notes and emphasizes the difficulties encountered and the costs incurred by prosecutors, by defense attorneys, by courts, by officials at FBI Headquarters, by the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, and by the Select Committee itself in determining the truth regarding material Abscam events. The Select Committee finds that those difficulties arose in large part from deficiencies in the FBI's undercover investigative policies, practices, and procedures during Abscam, as described above.

The Select Committee further finds, however, that those difficulties arose in equal measure from the tergiversation and mendacity permeating the statements made by central Abscam figures Melvin Weinberg, Angelo Errichetti, Howard Criden, and William Rosenberg to each other, to public officials, to colleagues, to FBI special agents, to prosecutors, and under oath to juries, grand juries, courts, and this Select Committee. Having reviewed hundreds of tapes and tape transcripts, having reviewed the testimony given at trials and at due process hearings, having viewed and heard those men in closed hearings of the Select Committee, and having compared the statements of each man with his own other statements, with the statements of other persons, and with relevant documents, the Select Committee finds and emphasizes that uncorroborated testimony given by any of those central figures has almost no probative value. Each of those central figures appears willing to fabricate evidence to serve his own interests. Undercover operations inevitably require investigators to rely on untrustworthy individuals to make the case. But the unreliability and incredibility of such individuals demonstrate the importance of rigorous recordkeeping, recording, management, supervision, and control in law enforcement undercover operations in which informants and middlemen play central roles.

The Select Committee further finds that, even though many of the criticisms of Abscam ultimately have been shown to lack merit, serious problems beyond those already described are created by the FBI's use of policies, practices, and procedures that readily give rise to such criticisms, that make it difficult to determine whether those criticisms are valid, and that spawn events showing many of the criticisms to be well-founded. These practices increase the difficulty and cost of evaluating the prosecutability of cases. They reduce the likelihood that cases will be found prosecutable and will be successfully prosecuted. They increase the likelihood that entrapment, due process, and other defenses will have to be litigated. They increase the costs of prosecutions. They undermine the credibility and reputation of federal law enforcement officials.

For the foregoing reasons, the Select Committee finds that the promulgation of the Attorney General's Guidelines on FBI Undercover Operations on January 5, 1981, the promulgation of the Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations on December 2, 1980, the promulgation of amended Attorney General's Guidelines on FBI Use of Informants and Confidential Sources on December 2, 1980, and the FBI's amendments to its policies, practices, and procedures since the

Abscam investigation ended have been important, salutary, and laudable events. The Select Committee further finds, however, that additional action by the Congress and by the executive branch is necessary and desirable, both to assist the FBI and other components of the Department of Justice in effectively and efficiently using the undercover technique and to ensure that the lives, civil liberties, and property of individual citizens of the United States are properly protected.

CHAPTER FOUR—SUMMARY OF RECOMMENDATIONS OF THE SELECT COMMITTEE

I. Legislative Recommendations

A. Authorization and reporting requirements

The Congress, through its appropriate committees, should consider legislation that:

1. Expressly authorizes the FBI, DEA, and INS to conduct undercover operations pursuant to guidelines established and maintained by the Attorney General;
2. Requires the Attorney General to issue, maintain, and enforce guidelines governing all undercover operations, and that requires the undercover guidelines to specify at least the following:
    - (a) The procedures to be followed to initiate and to renew the authorization for an undercover operation;
    - (b) The procedures to be followed to extend the time, increase the funds, or expand the geographic or subject-matter scope of an undercover operation;
    - (c) The procedures to be followed to terminate an undercover operation;
    - (d) The standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover operation should be initiated, extended, renewed, expanded, given increased funds, or terminated;
    - (e) The standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover agent may offer or cause to be offered to another person an opportunity to commit a crime;
    - (f) The functions, powers, composition, and voting procedures of an Undercover Operations Review Committee having at least six voting members, at least one of whom is an Assistant Director of the FBI and at least one of whom is a representative of the Office of Legal Counsel of the Department of Justice;
3. Requires the Attorney General to submit in writing to the Senate Committee on the Judiciary and the House Committee on the Judiciary, at least 30 days before it is promulgated, every guideline governing undercover operations, informants, or criminal investigations, and every amendment to, or deletion or formal interpretation of, any such guideline;
4. Expressly authorizes the FBI, DEA, and INS, when reasonably necessary to the successful implementation of an authorized undercover operation:
    - (a) To purchase or lease property, supplies, services, equipment, buildings or facilities, or to construct or to

alter buildings or facilties, or to contract for construction or alteration of buildings or facilities, in any State or in the District of Columbia, without regard to statutes, rules, and regulations specifically governing contracts, contract clauses, contract procedures, purchases, leases, construction, or alterations undertaken in the name of the United States;

(b) To establish and to operate proprietaries;

(c) To use proceeds generated by a proprietary established in connection with an undercover operation to offset necessary and reasonable expenses of that proprietary; provided, however, that the balance of such proceeds, and proceeds derived from the sale of the proprietary or of its assets, must be deposited in the Treasury of the United States as miscellaneous receipts; provided, further, that proceeds from such a proprietary may not be used to offset any other expenses of the undercover operation, and that all proceeds recovered or generated other than by the proprietary must be deposited in the Treasury of the United States as miscellaneous receipts;

(d) To deposit, in banks or in other financial institutions, funds appropriated by Congress for undercover operations; and

(e) To engage the services of cooperative individuals or entities in aid of undercover operations, and, upon the prior written approval of the Attorney General or of the Deputy Attorney General, to execute agreements to reimburse those individuals or entities for their services and for losses incurred by them as a direct result of such operations;

5. Requires the Attorney General annually to submit to the Senate Committee on the Judiciary and to the House Committee on the Judiciary a written report on all undercover operations (A) that were terminated during the preceding calendar year or (B) that were terminated during any prior year and in which, during the calendar year preceding the report, the operations resulted in an arrest, an indictment, a jury verdict, a sentence, a judgment of dismissal, a judgment of acquittal, or an appellate court decision, or (C) that were first approved by FBI HQ more than two years before the date of the annual report, with the annual report to contain at least the following information for each such operation:

(a) The date on which initiation of the operation was approved under the undercover guidelines;

(b) The identity of the ranking person who granted approval to initiate the operation;

(c) The number of special agents who worked as undercover agents in the operation during each year of the operation's existence;

(d) Each date on which an extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation was approved under the undercover guidelines;

(e) The identity of each ranking person who approved each extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation under the undercover guidelines;

(f) The date on which termination of the operation was approved under the undercover guidelines;

(g) The identity of the ranking person who approved the termination of the operation;

(h) The date on which the operation terminated and the manner in which termination was effected, including the manner in which the operation was made known to the news media;

(i) The arrests made in the operation during each year of the operation, including the identity of each person arrested and each crime for which he was arrested;

(j) The indictments issued as a result of the operation during each year of the operation, including the identity of each person indicted and each crime for which he was indicted;

(k) The expenses incurred, other than for salaries for employees of the United States Government, in the operation in each calendar year preceding the report;

(l) A description of each jury verdict, sentence, judgment or dismissal, judgment of conviction, and appellate court decision rendered or imposed as a result of the operation.

B. Entrapment

The Congress, through its appropriate committees, should consider legislation specifically creating an affirmative defense of entrapment, providing for the acquittal of a defendant when a federal law enforcement agent, or a private party acting under the direction of or with the prior approval of federal law enforcement authorities, is shown by a preponderance of the evidence to have induced the defendant to commit an offense, using methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense. This legislation should establish entrapment per se when it is shown by a preponderance of the evidence that the defendant committed the crime:

1. Because of a threat of harm, to the person or property of any individual, made by a federal law enforcement agent or by a private party acting under the direction of or with the prior approval of federal law enforcement authorities;
2. Because federal law enforcement agents manipulated the defendant's personal, economic, or vocational situation to increase the likelihood of his committing that crime; or
3. Because federal law enforcement agents provided goods or services that were necessary to the commission of the crime and that the defendant could not have obtained without government participation.

C. Threshold requirements for undercover operations

The Congress, through its appropriate committees, should consider legislation providing that:

1. No component of the Department of Justice may initiate, maintain, expand, extend, or renew an undercover operation except,

(a) When the operation is intended to obtain information about an identified individual, or to result in the offer to an identified individual of an opportunity to engage in a criminal act, upon a finding that there is reasonable suspicion, based upon articulable facts, that the individual has engaged, is engaging, or is likely to engage in criminal activity;

(b) When the operation is intended to obtain information about particular specified types of criminal acts, or generally to offer unspecified persons an opportunity or inducement to engage in criminal acts, upon a finding that there is reasonable suspicion, based on articulable facts, that the operation will detect past, ongoing, or planned criminal activity of that specified type; provided that, if, during the course of the operation, agents of the Department of Justice wish to offer to a specific individual—who is identified in advance of the offer—an inducement to engage in a criminal act, they may do so only upon a finding that there is a reasonable suspicion, based upon articulable facts, that the targeted individual has engaged, is engaging, or is likely to engage in criminal activity;

(c) When a government agent, informant, or cooperating individual will infiltrate any political, governmental, religious, or news media organization or entity, upon a finding that there is probable cause to believe that the operation is necessary to detect or to prevent specific acts of criminality;

(d) When a government agent, informant, or cooperating individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will enter into a confidential relationship with that person, upon a finding that there is probable cause to believe that the operation is necessary to detect or prevent specific acts of criminality;

2. When certain specified sensitive circumstances (including those currently listed in Paragraph B of the Attorney General's Guidelines on FBI Undercover Operations) are present or are reasonably expected to materialize during the course of the undercover operation, the finding of reasonable suspicion required by subsection (1)(a) or (b) above shall be made by the Undercover Operations Review Committee following procedures to be specified in guidelines. When there is no expectation that the operation will involve such sensitive circumstances, that determination shall be made by the Special Agent in Charge or by the equivalent official in the field following procedures to be specified in guidelines. Findings of probable cause, as required by subsection (1)(c) or (d) above, shall be made by the Undercover Operations Review Committee, following procedures to be specified in guidelines;

3. When the initiation, expansion, extension, or renewal of an undercover operation is necessary to protect life or to pre-

vent other serious harm, and when exigent circumstances make it impossible, before the harm is likely to occur, to obtain the authorization that would otherwise be required, the Special Agent in Charge or the equivalent official in the field may approve the operation upon his finding that the applicable requirements of subsection (1) have been met. A written application for approval must then be forwarded to the Undercover Operations Review Committee at the earliest possible opportunity, and in any event within 48 hours after the initiation, expansion, extension or renewal of the operation. If the subsequent written application for approval is denied, a full report of all activity undertaken during the course of the operation must be submitted to the Director and to the Attorney General;

4. A failure to comply with the provisions of this statute shall not provide a defense in any criminal prosecution or create any civil claim for relief.

D. Indemnification

The Congress, through its appropriate committees, should consider legislation to compensate from the United States Treasury persons (other than persons cooperating with or employed by the Department of Justice in connection with the undercover operation) injured in their person or property as a result of a Department of Justice undercover operation, under the following conditions and circumstances:

1. The injury was proximately caused by conduct, of a federal employee or of any other person acting at the direction of or with the prior acquiescence of federal law enforcement authorities, that violated a federal or state criminal statute, during the course of and in furtherance of a Department of Justice undercover operation;
2. The injury was proximately caused by conduct, of any federal employee or of any informant or other cooperating private individual, that violated a federal or state criminal statute and that the person who engaged in such conduct was enabled to commit by his participation in an undercover operation; or
3. The injury was proximately caused by negligence on the part of federal employees in the supervision or exercise of control over the undercover operation; provided, however, that an action should not lie under this legislation for injury caused by operational or management decisions that relate to the conduct of the undercover operation.

II. RECOMMENDATIONS AS TO GUIDELINES

A. The Attorney General should amend the current Attorney General's Guidelines on FBI Undercover Operations as follows:

1. To make the guidelines generally applicable to all undercover operations of the Department of Justice, except that the guidelines should provide for the applicability or inapplicability of specific provisions to a specific component of the Department of Justice where that is made reasonably necessary by the peculiar nature or function of that component;

2. To prohibit government employees, informants, and cooperating private individuals from supplying to any suspect any item or service that the Undercover Operations Review Committee does not reasonably believe would be available to that suspect in the absence of the participation of the government employee, informant, or cooperating private individual;

3. To define with precision the terms "undercover employee," "public official," "cooperating private individual," and "cooperating person";

4. To define with greater clarity and precision the terms "investigation," "inquiry," and "routine investigative interviews," making clear the differences between the terms;

5. To require that a copy of every written application for and approval of an SAC-approved undercover operation be provided to and reviewed for informational purposes by the Undercover Operations Review Committee within 20 days of the SAC's approval.

B. The Attorney General should amend the Attorney General's Guidelines on FBI Use of Informants and Confidential Sources to clarify the definition of the term "informant" by expressly stating that the applicability of the term "informant" to a person does not depend in any way upon whether the person has been approved or disapproved as an informant, but instead depends solely on the nature of the person's activities.

III. Recommendation as to Administrative Directives

The Director of the FBI should issue orders, to be included in the Manual of Investigative Operations and Guidelines, requiring that the following procedures be followed in all undercover operations:

A. In every undercover operation requiring approval by FBI HQ, the special agent supervisor at FBI HQ assigned to the operation must send to each special agent in the field assigned to the operation, immediately upon that special agent's being assigned to the operation, the following material:

1. A memorandum, approved by the Office of the Legal Counsel of the Department of Justice and by the Legal Counsel of the FBI, summarizing the law of entrapment;

2. A memorandum, summarizing requirements imposed by statutes, rules, regulations, and policies of the Department of Justice with respect to electronic surveillance and to consensual monitoring of conversations;

3. The Attorney General's Guidelines on FBI Undercover Operations;

4. The Attorney General's Guidelines on FBI Use of Informants and Confidential Sources;

5. A memorandum, summarizing the requirements for

(a) Recording all telephone conversations on telephones at an FBI front;

(b) Recording, whenever it can be done without unreasonably jeopardizing human safety or the cover of the operation, all conversations between an undercover special agent and a suspect or between an informant and a suspect;

(c) Debriefing informants on a regular basis regarding unrecorded conversations between them and a suspects;

(d) Preparing FD 302 reports;

(e) Marking and numbering recording tapes given to informants for use in undercover operations;

(f) Maintaining an up-to-date log, of all audio tapes and video tapes, reflecting for each recording the time, date, place, parties, and general substance of each conversation;

(g) Preparing reports, contemporaneous with the receipt of any tangible item that might be relevant evidence at any subsequent criminal trial, describing the time, date, and manner in which the item was obtained, including the identity of the person from whom the item was received;

(h) Transcribing audio and video tapes and providing copies of the transcripts to the appropriate United States Attorney's office or Strike Force office and to FBI HQ;

(i) Filing with FBI HQ a monthly report describing, at least,

(*i*) New suspects and the principal evidence causing them to be suspects;

(*ii*) Any planned or actual expansion of the geographic scope of the operation;

(*iii*) Any planned or actual expansion of the subject-matter scope—that is, the types of crime being investigated or being discussed with possible suspects—of the operation;

(*iv*) Any significant change in the operation's cover or cover scenario;

(*v*) Any information whose possession by the Undercover Operations Review Committee, when that committee was considering any prior application to initiate, extend, renew, or expand the undercover operation, would reasonably have been more likely to have caused the Undercover Operations Review Committee to deny the application;

(*vi*) Any investigative technique newly used in the operation;

(*vii*) Actions taken to ensure coordination with the appropriate United States Attorney's office or Strike Force office;

(*viii*) Any significant problem or anticipated problem in the management or supervision of the investigation or in coordination with the appropriate United States Attorney's office or Strike Force office;

(*ix*) The past month's additions to the log of audio and video recordings.

B. In every undercover operation requiring approval by FBI HQ, the special agent supervisor at FBI HQ assigned to the operation must monitor the operation, ensure strict compliance with the reporting requirements described in Subparagraph A(5)(i) above, inquire about any apparent failure by special agents in the field to comply with the requirements described in Subparagraphs A(5)(a)–(h) above, report to his immediate superior any repeated failure to comply, and immediately provide to the Undercover Operations Review Committee any information received under Subparagraph A(5)(i)(*v*) above.

IV. RECOMMENDATION FOR ADMINISTRATIVE POLICY

The Select Committee recommends that in appropriate circumstances, when leaks to news media result in injury to a clearly innocent person, as occurred in Abscam with respect to Senator Larry Pressler, the Department of Justice should, at the request of that person, upon finding that a decision not to provide such a writing to other persons would not cause them undue harm, promptly inform him in writing that he is not suspected of any improper conduct.[1]

V. APPROPRIATIONS RECOMMENDATIONS

If, after considering the statistics and other facts described in this report, Congress finds it necessary and desirable for the FBI and other components of the Department of Justice to conduct at least as many undercover operations as those entities currently conduct, the appropriations for such operations should be increased sufficiently to enable undercover agents to have available at all times the basic equipment (primarily tape recorders and tapes) and staff support (transcribers, typists, and couriers, in particular) needed to enable them to satisfy the investigative, logistical, and procedural requirements that must be implemented and satisfied to reduce the risk that deficiencies such as those that characterized Abscam will not recur.

VI. CONCLUDING OBSERVATIONS

The Abscam undercover operation initially raised questions about the possibility that the executive branch could use its law enforcement powers to encroach upon the independence of the other branches of government and thereby to endanger the constitutionally mandated separation of powers. The Select Committee's investigation shows that no such encroachment occurred in Abscam, but events such as those described at pages 57, 62–63, 76 note 14 below demonstrate that the danger is no mere chimera. Secret police powers exercised honorably by today's high-minded officials can readily be tomorrow's abuses in the hands of less scrupulous administrators.

Nevertheless, the Select Committee has concluded that the proposals it has recommended to protect the civil liberties of all citizens will also adequately protect the separation of powers. The Select Committee finds this generally uniform approach far preferable to one, such as that proposed by Professor James Q. Wilson, that attempts to devise particular safeguards for the legislative branch. The uniform approach better ensures that the criminal laws can and will be used to protect the public against all forms of crime by all types of criminals, including those at the highest level of any of the three branches of government.

---

[1] *See generally* Sel. Comm. Hrg., July 22, 1982, at 134–38.

CHAPTER FIVE—THE ATTORNEY GENERAL'S GUIDELINES

The Attorney General's Guidelines on FBI Undercover Operations (the "Undercover Guidelines"), promulgated on January 5, 1981, are but one of six sets of guidelines publicly promulgated by the Attorney General between 1976 and 1981.[1] Three of those sets—the Undercover Guidelines, the Guidelines on Criminal Investigations of Individuals and Organizations, and the Guidelines on FBI Use of Informants and Confidential Sources—apply to virtually every undercover operation. Certainly, all three would apply to operations like Abscam, Lobster, Labou, Frontload, and Buyin, were such operations to be commenced today.

This section of the report provides a brief history of FBI undercover activities. It then outlines the principal requirements of the undercover guidelines and of the other two sets of guidelines that are usually implicated by the commencement of an undercover operation.

I. A Brief History of FBI Undercover Activities

The FBI has been the principal investigative arm of the Department of Justice since 1908, when Attorney General Charles J. Bonaparte issued an order creating what was then called the Bureau of Investigation. From its earliest years the Bureau relied substantially upon confidential informants for its investigations. Policy instructions as early as 1919 stressed the need to preserve "the cover of our confidential informants." (Book III, Final Report of the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 2d Sess. 383 (1976) [hereinafter cited as Church Committee, Bk. III].) Early criticism of the Bureau also stressed the risks of agents provocateurs. After the infamous "Palmer Raids" against alleged Communists in 1920, a group of distinguished jurists, including Roscoe Pound, Felix Frankfurter, and Zechariah Chaffee, Jr., prepared a report on the Department of Justice stating:

> We do not question the right of the Department of Justice to use its agents in the Bureau of Investigation to ascertain when the law is being violated. But the American people have never tolerated the use of undercover provocative agents or "agents provocateurs" such as have been familiar in old Russia or Spain. (*Id.* at 385.)

---

[1] The other five sets are the Attorney General's Guidelines on FBI Use of Informants and Confidential Sources; the Attorney General's Guidelines on Use of Informants in Domestic Security, Organized Crime, and Other Criminal Investigations; the Attorney General's Guidelines on Domestic Security Investigations; the Attorney General's Guidelines on Civil Disorders and Demonstrations; and the Attorney General's Guidelines on Foreign Intelligence and Counterintelligence Investigations.

These and other concerns aroused by the "Palmer Raids" led in 1921 to the first Congressional investigation of the Bureau. (*See id.* at 382–88.)

The Bureau of Investigation reached its nadir under the Harding Administration and Attorney General Harry Daugherty, who had appointed the head of a private detective agency, William J. Burns, as Director. According to one authoritative account, Burns used Bureau agents "to spy on members of Congress who were then demanding investigations of reported corruption in the Harding Administration—corruption that had included the infamous 'Teapot Dome' scandal." (D. Whitehead, *The FBI Story* 63 (1956).) An associate of Burns later testified to a Senate committee that Burns "had arranged to have agents sneak into senators' offices, open their mail, search their files and spy on them in an effort to find something damaging which could be used to stop their attacks on Daugherty." (*Id.* at 65.) [2] In 1924 Harlan Fiske Stone was appointed Attorney General and undertook to reform the Bureau. He declared:

> There is always the possibility that a secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood; . . . it is important . . . that its agents themselves be not above the law or beyond its reach. (A. Mason, *Harlan Fiske Stone: Pillar of the Law* 153 (1956).)

When he appointed 29-year-old J. Edgar Hoover as Director, Stone instructed him to "clean" house so that the Bureau would operate independent of "political pressure." (*Id.* at 150.)

One document from Hoover's first years as Director suggests his reluctance to adopt undercover methods that might evoke criticism of the Bureau. In 1932 he advised the Attorney General against expanding Bureau authority to investigate Communist activities in the United States, because "the Bureau would undoubtedly be subject to charges in the matters of alleged secret and undesirable methods . . . as well as to allegations involving the use of 'Agents Provocateur.' " (Church Committee, Bk. III, at 391.) He expressed concern that "undercover" activities would be necessary "to secure a foothold in Communistic inner circles," and he warned that this would change the nature of the Bureau's work, which was "of an open character not in any manner subject to criticism" and subject to "the closest scrutiny at all times." (*Id.*)

In 1936, however, President Roosevelt directed what had by then become the FBI to undertake intelligence investigations of "subversive activities in this country, including communism and fascism." (*Id.* at 396.) Hoover assured the Attorney General that such investigations would be "handled in a most discreet and confidential manner." (*Id.*) As the Director recommended in 1938, FBI intelligence operations were expanded "with the utmost degree of secrecy in order to avoid criticism or objections which might be raised to such an expansion by either illinformed persons or individuals having some ulterior motive." (*Id.* at 398.) The FBI appears to have relied heavily on confidential informants and sources for these investigations. (*See id.* at 391-99.)

---

[2] This account goes on to quote an exchange at the Senate hearing between Senator Wheeler and Burn's associate Gaston B. Means:

"At one point, Senator Wheeler said: 'Senator Moses [of New Hampshire] suggests to me that I can save time by asking you what Senators you have not investigated?'

Means: 'Oh, there are lots of them I haven't. They are a pretty clean body. You don't find much on them either. You don't find very much.' " (*Id.* at 65)

During the 1930s Hoover successfully resisted proposals to assign to the FBI law enforcement functions that might threaten the integrity of its personnel. He opposed merger of the Prohibition Bureau with the FBI because of his desire to keep his organization free of scandal, and he stressed that the primary responsibility for prosecuting racketeers rested with state authorities. He focused the FBI's criminal investigations on enforcement of federal laws against bank robbery, interstate theft, interstate flight to avoid prosecution, extortion using interstate communications, and interstate kidnapping. The FBI's work came to public attention mainly as a result of highly publicized successes in apprehending notorious gangsters. (*See* D. Whitehead, *supra* page 35, at 96–102.)

Despite Hoover's concern about criticism and about threats to the integrity of FBI personnel, FBI special agents did some undercover work in criminal and intelligence investigations. A history of the FBI written in the 1950s with Hoover's cooperation gives several examples. In one case in Georgia in 1929, an FBI agent played the role of a madman in order to bring to trial a crooked banker who was feigning insanity. The undercover agent was committed to the institution to which the banker had been committed, thereby enabling the agent to watch the banker and to gather evidence of his ability to stand trial. In another case during the 1920s, four agents worked undercover in an Oklahoma town where Indians were being terrorized. The agents found leads that resulted in the identification of the killers of tribe members. (*See id.* at 81–82, 113–18.)

During World War II the FBI took on a major undercover intelligence assignment abroad. A Special Intelligence Service (SIS) created within the FBI had responsibility for foreign intelligence and counterintelligence operations in the Western Hemisphere. Presidential directives ordered SIS to "obtain, primarily through undercover operations supplemented when necessary by open operations, economic, political, industrial, financial, and subversive information." (Church Committee, Bk. III, at 425 note 187.) Within the United States, wartime FBI operations included surreptitious entries conducted by undercover agents to install electronic surveillance devices or to search for and seize property to obtain intelligence information. (*Id.* at 422–26.) FBI documents provided to the Select Committee suggest that, from 1939 through the end of World War II, the FBI used undercover agents for a limited number of operations to detect sabotage and espionage in defense-related segments of domestic private industry.

FBI agents were seldom used after the war for long-term or complex undercover operations. While agents continued to use pretext techniques to obtain information under false pretenses, internal FBI policies made it difficult for agents to operate under cover. The authoritative history of the FBI written in the 1950s made no reference to the contemporaneous use of undercover agents. Instead, it described FBI regulations and procedures that precluded sustained undercover work:

> Each special agent signs a register, and jots down the time, whenever he enters or leaves his office, whether it's in New York City, Honolulu, Chicago, or any other city. The system works the same way in all FBI offices. At three-hour intervals while on duty the agent must telephone to his office to check for any messages or any unexpected change of assignment. He tells the office where he is and where he is going, and a note is made of it. The special agent in charge can check the agent's register card in the communications section at any time and know where the agent is and the particular case on which he is working. . . .
>
> It would seem entirely reasonable to expect an FBI agent to take a Bureau car home with him the night before he is to go on an investigation; then the car would be available for a quick start on the job next morning. But such is not the case. The agent doesn't take the car home. He leaves his house the next morning an hour earlier, if necessary, and comes to the central garage to pick up the car assigned to him. And he must return the car to the garage when he is finished with his work. Again, there is a reason for this rule. Hoover insists that his agents cannot have government vehicles parked outside their homes during off-duty hours because someone might say, "Look at that FBI man, keeping a government car for his personal use." Hoover has said, "We can't afford merely to be right. We must give every appearance of doing right to avoid criticism. (D. Whitehead, *supra* page 35, at 123.)

As political scientist James Q. Wilson has explained, FBI agents usually performed their law enforcement functions as detectives who investigated crimes after they had been committed and had been reported to authorities. By contrast, the Drug Enforcement Administration and its predecessors more often used undercover operations to create the opportunity for the commission of crimes by suspects. Professor Wilson has summarized J. Edgar Hoover's reasons for having resisted the latter role for the FBI:

> Hoover refused . . . to change Bureau policy when the central tasks of the agents would have to be altered. Narcotics investigation meant turning agents into investigators, working undercover in situations that required one to emulate, if not adopt, the language, style, and values of the criminal world. Not only would this expose agents to temptations involving money and valuable narcotics, it would also require them to engage in enforcement policies that, though legal, struck many citizens as unsavory. And perhaps most important, the key asset of the agent—public acceptance and confidence—might be weakened as the agent's image changed from that of a bank clerk or insurance salesman to that of a habitue of "street life." (J.

Wilson, *The Investigators: Managing FBI and Narcotics Agents* 171 (1978).)

FBI accomplishments were measured by case-load and money "savings" statistics that were sometimes "almost meaningless," a system that discouraged agents from initiating more complex investigations of sophisticated organized or white collar crimes. (*Id.* at 26–27, 39–40, 95–100.)

In the domestic intelligence field, the FBI developed covert methods that seldom required the use of undercover agents for purposes other than surveillance. The programs for covertly disrupting and "neutralizing" domestic groups and leaders were examined in depth by the Church Committee in 1975. The Church Committee reported:

> The FBI's COINTELPRO—counterintelligence program—was designed to "disrupt" groups and "neutralize" individuals deemed to be threats to domestic security. The FBI resorted to counterintelligence tactics in part because its chief officials believed that the existing law could not control the activities of certain dissident groups, and that court decisions had tied the hands of the intelligence community. Whatever opinion one holds about the policies of the targeted groups, many of the tactics employed by the FBI were indisputably degrading to a free society. . . . (Book II, Final Report of the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 2d Sess. 10 (1976) [hereinafter cited as Church Committee, Bk. II].)

COINTELPRO consisted largely of anonymous or fictitious "poison pen" letters, spreading "misinformation" for harrassment purposes and using informants and other contacts to discredit individuals and fragmented groups. (*Id.* at 211–25.) A special "DO NOT FILE" procedure was adopted for destroying the records of authorization for so-called "black bag jobs," warrantless surreptitious entries presumed by FBI officials to be illegal. (Church Committee, Bk. III, at 358.) [3] In some intelligence cases FBI agents worked undercover without Director Hoover's knowledge to investigate "New Left" opponents of the Vietnam war in the late 1960s.[4] A few FBI documents provided to the Select Committee also suggest that undercover agents were used to infiltrate Communist organizations between World War II and 1972.

---

[3] An FBI memorandum written in 1966 stated:

"We do not obtain authorization for 'black bag' jobs outside the Bureau. Such a technique involves trespassing and is clearly illegal; therefore, it would be impossible to obtain any legal sanction for it. Despite this, 'black bag' jobs have been used because they represent an invaluable technique in combating subversive activities of a clandestine nature aimed directly at undermining and destroying our nation."

(Church Committee, Bk. III, at 358.)

[4] William C. Sullivan, Assistant Director for the FBI Domestic Intelligence Division during the 1960s, wrote in his memoirs:

"Some agents, especially some of the younger ones, infiltrated many of the groups in spite of Hoover's insisting to me that no agent should wear long hair, dress in jeans, or wear a beard. I said 'the hell with it' and made the decision myself to go against Hoover's dogmatic ruling."

(W. Sullivan (with W. Brown), *The Bureau: My Thirty Years in Hoover's FBI* 152, 158–59 (1979).)

J. Edgar Hoover died in 1972. Documents provided to the Select Committee indicate that the FBI resumed using undercover agents in criminal investigations in 1972. Undercover techniques were employed in a limited fashion by FBI agents investigating subjects who were seeking outlets for stolen property, or "fences," and by FBI agents investigating gambling and extortion cases. Between January 1973 and December 1974, the FBI used undercover agents in approximately 30 investigative matters unrelated to the gathering of domestic intelligence. Most of the matters focused on stolen property or fraud.

Under Director Clarence M. Kelley, the FBI undertook a full-scale reassessment of its law enforcement operations. As described by James Q. Wilson, this review led in 1975 to a new policy of "quality over quantity" that abandoned previous statistical accomplishment measures and emphasized new objectives:

> Each SAC was to set priorities as to the kinds of cases that were important in his area and to concentrate resources on them. Statistics were to be downplayed. Within a year, the results were being felt. The total number of pending cases declined by 23 percent and the average caseload per agent fell from 26.1 to 19.1. . . .
>
> There was no immediate decline in the number of prosecutions or any significant decline in the number of convictions. . . .
>
> The pressure on agents to keep up a certain caseload for statistical purposes was lessened and accordingly the paperwork and diversion of energy necessary to process "junk" cases became smaller. (J. Wilson, *supra* page 38, at 131.)

Wilson observed, however, that Director Kelley's policy did not produce a corresponding change in the FBI's approach to significant cases until after 1975. The next stage was to reorganize several of the larger FBI offices in order to give higher priority to "proactive investigations": investigations that created opportunities for criminals to commit crimes, as opposed to investigations of crimes previously committed. Wilson described how one office implemented the new policy.

> Twenty-two agents were assigned to two "general crime" squads charged with responding to victim complaints regarding the traditional crime classifications—theft, robbery, kidnapping, bad checks, and fugitives. The remaining ninety-one agents doing criminal work were assigned to eight "target" squads concerned with consensual, extortionate, and disparate crimes. The assignment of each target squad was not based chiefly on types of crimes but on types of offenders—businessmen, local government officials, labor leaders, the business affairs of the federal government, and organized crime groups. Each squad was instructed to search out cases involving such persons by cultivating informants and pursuing leads from other government agencies as well as by responding to citizen and victim complaints. Each was to employ whatever federal

> laws seemed appropriate in building a case rather than being confined to a single crime category. The reorganization involved a massive shift of resources; more than seventy agents who once were doing reactive or security work were put into proactive work. As a supervisor later explained to an interviewer, "The SAC said, 'get rid of the crap and work the big cases.' " *(Id.* at 138.)

This "target squad concept" met substantial resistance within the FBI, but was promoted by Director Kelley and "represented the greatest administrative change" at the FBI field office level in many years. (*Id.* at 131–32, 138–42.)

Director Kelley's management changes essentially coincided with the FBI's decision in 1975 and 1976 to undertake joint undercover operations with local law enforcement agencies under Law Enforcement Assistance Administration (LEAA) grants. LEAA began an extensive program of support for anti-fencing projects in 1974. These projects, targeted almost exclusively against property crimes, usually used undercover officers posing as fences seeking to traffic in stolen goods. (*See generally* Criminal Conspiracies Division, Office of Criminal Justice Programs, LEAA, *Property Crime Program, A Special Report: Overview of the "Sting" Program and Project* (Jan. 1981).) Many local law enforcement agencies were enthusiastic about the potential of this technique—commonly called a "sting"—for interdicting the chain of distribution of stolen property, but federal agencies, particularly the FBI, were initially reluctant to participate as partners in LEAA-funded stings. The success of the first FBI-assisted stings, however, sparked greater FBI interest in undercover operations.

The FBI's main contributions to the first LEAA-funded stings were manpower and equipment, but it also frequently provided cooperating witnesses. (*See* Criminal Conspiracies Division, Office of Criminal Justice Programs, LEAA, *Property Crime Projects: Planning, Organization and Implementation* 4–8 (Jan. 1981) [hereinafter cited as 1981 Manual].) One of the benefits for the FBI was the development of expertise in this law enforcement technique. From the LEAA stings, the FBI "acquir[ed] substantial experience in how to mount and execute and undercover effort in ways that avoided claims of entrapment." (Wilson, *supra* page 2 note 5, at 11.)

LEAA's anti-fencing activities included training, both in the technical aspects of the sting (for example, operation of videotape equipment to record the criminal transactions) and in the planning and management of the operation. LEAA at first relied heavily on the expertise of local law enforcement agencies with experience in undercover operations. As the program expanded and the training became more formalized, FBI participation increased. By August of 1976, when LEAA's first anti-fencing manual was published, the FBI was listed as a "contributing law enforcement agency with experience in storefront operations"; an FBI representative served on the review panel for the manual. (Enforcement Program Division, Office of Regional Operations, LEAA, *Strategies for Combating the Criminal Receiver of Stolen Goods: An Anti-Fencing Manual for Law Enforcement Agencies* 119–20 (1976).) The manual stressed several requirements, including that of thorough familiarity of undercover unit personnel with "legal and evidentiary requirements" and with recordkeeping responsibilities:

> An anti-fencing detail must be meticulous in the care of its records and in the integrity of the procedures it follows. . . . The paperwork of an anti-fencing unit is as important as its field work—a point which should be clearly stressed in orientation and re-emphasized as the unit proceeds to work. (*Id.* at 37.)

The 1976 manual also underscored that "the strategic targets of the anti-fencing effort should be clearly specified in advance," and it suggested several methods for selecting those targets. (*Id.* at 49–53.)

A more extensive manual issued by the LEAA Property Crime Program in 1981 expanded on these requirements. (*See,* 1981 Manual at 5–5 to 5–7 (training curriculum for undercover agents); *id.* at 4–7 to 4–8 (control of cooperating individuals).) The 1981 manual noted that detailed written preliminary planning "can be the decisive difference between an effective project . . . and an ineffective effort." (*Id.* at 2–3.) The manual also provided extensive guidance on administrative matters, including principles of evidence management, flow charts for the disposition of recorded evidence and of the results of the recommended daily debriefings of undercover operatives, and preparation of a case jacket collecting "every scrap of information" on each target. (*Id.* at 3–14 to 3–24.)

In the LEAA stings, FBI agents acquired and developed skills that the FBI later used in its own undercover operations. But despite the complexity of some of the projects in which the FBI participated as part of the LEAA program, almost all were targeted against property crimes. Indeed, most of the central participants in the LEAA program believed that elaborate undercover operations were generally inappropriate for more sophisticated operations against white-collar crime and public corruption. This belief was reflected in LEAA's publications. For example, a 1977 manual on white-collar crime declared, "As a general rule, . . . undercover operations which involve penetration as participants are far less valuable in the white-collar crime area than in other areas of criminal investigation," and predicted that the technique would be useful only for "an occasional and unusual opportunity." (Enforcement Program Division, Office of Regional Operations, LEAA, *The Investigation of White-Collar Crime: A Manual for Law Enforcement Agencies* 175 (1977).)

In 1979, LEAA officials remarked on the FBI's waning interest in cooperating in agency-funded stings and attributed that development to a reassessment of the FBI's priorities, including an increased emphasis on white-collar and organized crime. (Law Enforcement Assistance Reform, Hearings Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 75–76 (1979) (testimony of Henry S. Dogin).) In 1981 the LEAA ceased to exist.

Probably the most sustained undercover operation in the 1972–1977 period involved the use of FBI agents to search for Weather Underground terrorists who were fugitives. One event in the operation was described to the Senate Judiciary Committee in 1978 by

Attorney General Griffin B. Bell and FBI Associate Director James B. Adams:

> Attorney General BELL. Let me give you an example. . . . We had the two undercover agents working with the Weathermen. They were asked to give marksmanship training. Mr. Adams brought it over to me for authorization in writing. That chilled my rights, I thought, right then, because I did not want to do it. These people have been underground, at least one of them has been underground for, I believe 4 years. So, I finally authorized him to teach marksmanship to these people, but to do it on a misinformation basis. [Laughter.]
>
> They could teach them how to miss. [Laughter.]
>
> They could teach them how to miss everytime. Fortunately, within 1 month after that they were able to apprehend these people just before they planted a bomb in front of a State senator's house.
>
> * * * * * * *
>
> Mr. ADAMS. As Judge Bell mentioned, in that case that was one that was so sensitive it was presented to him personally. Also, in connection with this case, recognizing the various decisions that do come up in this area, which could not be covered in our manuals . . . we had a U.S. attorney specifically assigned to these undercover agents in order to give them the daily legal guidance necessary. . . .

Adams stressed that the use of undercover agents to penetrate the Weather Underground organization had made it possible to "prevent the action taking place [when] it reached the conspiratorial stage." (FBI Statutory Charter: Hearings Before the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 1, at 45, 62 (1978).

The Department of Justice's appropriation request for the 1977 fiscal year was the first that expressly requested funds for "undercover activities." The request was for $1,000,000, and that sum, exclusive of employees' salaries, related expenses and equipment, was in fact appropriated for fiscal year 1977. In that fiscal year the FBI conducted 53 undercover operations in which the operations were managed and funded solely by the FBI. The FBI also participated in several joint local-federal undercover operations financed with LEAA funds. Between 1976 and April 1978, there were 20 such LEAA-funded joint operations. During this period, undercover operations in which the FBI participated were aimed at stolen property, organized crime, and political corruption.

Between fiscal year 1977 and today, the appropriations for and use of undercover operations have increased substantially, as follows:

Year	Appropriations	Number of operations
Fiscal year 1977	$1,000,000	53
Fiscal year 1978	3,000,000	176
Fiscal year 1979	3,000,000	239
Fiscal year 1980	3,000,000	314
Fiscal year 1981	4,500,000	463

During that period, the undercover technique was used in investigations of white-collar crimes, political corruption, personal and property crimes, and racketeering crimes.

II. GUIDELINES ON CRIMINAL INVESTIGATIONS OF INDIVIDUALS AND ORGANIZATIONS

On December 2, 1980, Attorney General Benjamin R. Civiletti issued the Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations (the "Criminal Investigation Guidelines").[5] Just as he was to do with the Undercover Guidelines when they issued one month later, Civiletti stated that the Criminal Investigation Guidelines essentially "reaffirm current investigative practices of the FBI." (Criminal Investigation Guidelines 1.)

In announcing the Criminal Investigation Guidelines, Civiletti made another statement important to the Select Committee's study of undercover policies and practices. After observing that "the FBI has the authority and responsibility to investigate all criminal violations of federal law not exclusively assigned to another federal agency," he stated that the standards and requirements set forth in the Criminal Investigation Guidelines govern all criminal investigations by the FBI, specify the circumstances under which any investigation may be begun, and dictate the permissible scope, duration, subject matter, and objectives of any investigation. Thus, the guidelines would apply today to FBI investigations of all categories of crime involved in the various undercover operations chosen by the Select Committee for review: political corruption, white-collar crime, racketeering, and personal and property crimes.

The following is a summary of the principal provisions of, together with brief comments on, the Criminal Investigation Guidelines.

> A. "An investigation may be opened when there are facts or circumstances that reasonably indicate a federal criminal violation has occurred, is occurring, or will occur. This standard . . . does require specific facts or circumstances indicating a violation." The guidelines refer only to what is required to open an investigation. They say nothing about what is required to expand an existing investigation to cover a new type of criminal conduct, new persons as targets, or a new geographic area. Further, the term "investigation" is undefined.
>
> B. "Where the factual basis for an investigation does not yet exist, but some response appears to be warranted to an allegation or other information concerning possible illegal conduct, these Guidelines also permit the limited step of conducting a preliminary 'inquiry.' Inquiries as a general rule should be less intrusive and of shorter duration than full investigations."
>
> > 1. Inquiries are thus defined simply as being, "as a general rule," different from full investigations. But neither

---

[5] The Criminal Investigation Guidelines are reprinted in Appendix D to this report.

"full investigation" nor "investigation" is defined anywhere in the guidelines.

2. Because no indication appears anywhere as to when the "general rule" applies, the guidelines permit an inquiry to be as intrusive as, and as long as, a full investigation.

3. The guidelines specify that mail covers, mail openings, nonconsensual electronic surveillance, and other techniques specified in 18 U.S.C. §§ 2510-2520 "shall not be used during an inquiry"; but they clearly permit the use of undercover techniques, even though there is no reasonable indication, or any indication at all, that a crime has been, is being, or will be committed.

C. The FBI supervisor authorizing an investigation must ensure "that the facts or circumstances meeting the standard of reasonable indication have been recorded in writing." This does not restrict inquiries.

D. In "sensitive criminal matters" (which include any alleged criminal conduct by a public official, by a religious organizations, by a primarily political organization, or by the news media), the FBI office opening the investigation must in writing notify FBI Headquarters and "the United States Attorney or an appropriate Department of Justice official as soon as practicable after commencement of the investigation."

E. For consensual monitoring of conversations (that is, where at least one party to the conversations consents in advance to have the conversation recorded):

1. advance authorization must be obtained from the Special Agent in charge ("SAC") and from the appropriate United States Attorney, except in exigent circumstances, to monitor telephone conversations; and

2. "advance authorization must be obtained from the Director or Associate Director of the Office of Enforcement Operations or a Deputy Assistant Attorney General in charge of the Criminal Division, except in exigent circumstances," to monitor nontelephonic conversations.

F. The special agent conducting an investigation must maintain, "periodic written or oral contact with the appropriate federal prosecutor." The guidelines do not dictate any minimum content for such reports; any maximum period permitted without the making of such a report; any specification of how to determine the identity of the "appropriate federal prosecutor"; or reporting requirements in cases where, as in Abscam, prosecutors from several districts are involved and require prompt, accurate information.

G. The guidelines provide for informational investigations of, as opposed to investigations of crimes committed by, racketeering enterprises. These informational investigations may employ any lawful investigative technique that the guidelines permit for a full criminal investigation. This includes undercover techniques.

H. The guidelines state that they "are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative and litigative prerogatives of the Department of Justice." Thus, even egregious violations of the guidelines by a special agent will not, by that fact, support dismissal of a prosecution or compensation for an injured person, even if that person is innocent of any wrongdoing.

III. GUIDELINES ON FBI USE OF INFORMANTS AND CONFIDENTIAL SOURCES

On December 15, 1976, Attorney General Edward H. Levi issued a set of guidelines entitled Use of Informants in Domestic Security, Organized Crime, and Other Criminal Investigations (the "Levi Guidelines").[6] On December 2, 1980, Attorney General Benjamin R. Civiletti issued a revised set of guidelines governing the FBI's use of informants. The revised set, which is still in force, is called the Attorney General's Guidelines on FBI Use of Informants and Confidential Sources (the "Informant Guidelines").[7]

The outline that follows describes important portions of both sets of guidelines. Several significant differences are expressly noted.

A. General provisions

The introductory portion of the Levi Guidelines

1. expressly states that, because the use of informants "may involve an element of deception and intrusion into the privacy of individuals or may require government cooperation with persons whose reliability and motivation may be open to question," the use of informants "should be carefully limited." The current Informant Guidelines, while reiterating the dangers that informants pose, omit the statement that the use of informants should be carefully limited.
2. expressly requires that "special care be taken . . . to minimize their use." The current Informant Guidelines omit that requirement.
3. expressly states that the use of an informant "imposes a special responsibility upon the FBI when the informant engages in activity where he has received, or reasonably thinks he has received, encouragement or directions for that activity from the FBI." The current Informant Guidelines reiterate this, except that they state that use of an informant "*can* impose," rather than "imposes," such a special responsibility.

Each of these differences suggests that the current Informant Guidelines are in some respects more permissive than were the Levi Guidelines, which governed during the Abscam investigation.

B. Definitions

The Levi Guidelines do not define "informant." The Informant Guidelines provide the following definitions:

1. "Confidential source" is a person furnishing information to the FBI on a confidential basis, where the information has

---

[6] The Levi Guidelines are reprinted in Appendix D to this report.

[7] The Informant Guidelines are reprinted in Appendix D to this report.

been obtained as a result of legitimate employment or access to records and is provided consistent with applicable law.

2. "Informant" is anyone else furnishing information to the FBI on a confidential basis.

3. "Continuing basis" is providing information "with some degree of regularity."

As noted in this report (*see* pages 399–400 *infra*), the FBI's policy and practice, not articulated in any published guideline, is to restrict the term "informant" even further by requiring that there be an open 137 file on a person before he is treated as an informant.

C. Suitability of an informant

1. The Informant Guidelines require the following:

(a) Before an informant or confidential source may be used on a continuing basis or to associate in criminal activities, the supervisory FBI official designated by the Director must make a written finding that he "appears suitable for such use" and that the information or assistance likely to be obtained "is pertinent to authorized FBI investigative activity or law enforcement responsibilities."

(b) A finding of suitability "should be preceded by a preliminary inquiry" about the proposed informant or confidential source.

(c) In determining suitability, the FBI must consider, among other things, the nature of the matter, the seriousness of the informant's known and suspected crimes, the informant's reliability and truthfulness (or the availability of means to verify information he provides), his past conformance to FBI instructions, how closely the FBI will be able to monitor and control him, and the risk of intrusion upon privileged communications.

(d) The suitability determination must be reviewed at least every 90 days by a field supervisor and at least annually by FBI HQ.

(e) If the FBI learns of unsuitability, the informant's relationship with the FBI shall be promptly terminated.

2. The Levi Guidelines required no written determination of suitability. They did, however, state that the FBI "should weigh" several specified factors when considering the use of an informant, including:

(a) the risk that the informant may violate individual rights or "compromise in any way the investigation or subsequent prosecution";

(b) the nature and seriousness of the matter;

(c) the character and motivation of the informant, and his proven reliability and truthfulness;

(d) the availability of means to verify information he provides;

(e) the ability of the FBI to control the informant's activities;

(f) the value of anticipated information; and

(g) the value of the compensation sought by the informant.

D. Required instructions

Under the Informant Guidelines, each informant or confidential source must be advised:

1. that his FBI activities will not protect him from prosecution for violations of law unless the FBI has determined that criminal activity is justified for law enforcement purposes; and
2. that under no circumstances is he to participate in any act of violence, instigate a plan to commit criminal acts, or use illegal techniques.

He must be readvised at least annually and whenever there is reason to suspect a violation.

E. Authorized participation in criminal activity

1. The Levi Guidelines included *no* allowable criminal activity by informants. The Informant Guidelines, however, provide that criminal activity by an informant may be authorized when:

   (a) criminal conduct is necessary to obtain information or evidence for paramount prosecutive purposes, to maintain cover, or to prevent danger of death or serious bodily injury; *and*

   (b) the need for such conduct outweighs the seriousness of the conduct involved.

2. Two types of criminal activities are defined:

   (a) "Extraordinary" criminal conduct involves a significant risk of violence, corrupt action by high public officials, or severe financial loss to a victim. Authorization to participate in extraordinary activity can be made only by an SAC in writing and with approval of a United States Attorney. The written authorization is then forwarded to FBI HQ and to the Assistant Attorney General in charge of the Criminal Division.

   (b) "Ordinary" criminal conduct is all other criminal conduct. Participation may be approved in writing by an FBI field supervisor.

In approving participation in criminal activity, the FBI is required to seek to minimize the effect on innocent individuals, to minimize the informant's participation, to supervise closely that participation, and to ensure that the informant does not directly profit from his participation.

F. Unauthorized participation in criminal activity

1. If an FBI special agent learns that the informant or confidential source has participated in unauthorized criminal acitivity in connection with an FBI assignment or in any "serious crime . . . unconnected to an FBI assignment," the special agent must notify the field supervisor, and the field supervisor must determine whether to notify state or local law enforcement officers and whether continued use of the informant or confidential source is justified. The Informant Guidelines later state, and the original Levi Guidelines stated, "Under no circumstances shall the FBI take any action to conceal a crime by one of its informants." This apparent inconsistency—empowering the field supervisor to decide whether to inform law enforcement officials, but stating that con-

cealment of a crime is never permitted—is unresolved by other provisions in the Informant Guidelines.

2. If a decision is made not to notify, or if notification is given and the authorities are requested to delay or to forgo action, the FBI must notify the Assistant Attorney General in charge of the Criminal Division, and this notification must include what use will be made of the information gathered through the violation and whether continued use will be made of the informant or confidential source.

3. If an FBI field office learns of participation by an informant or confidential source in "a serious act of violence," it must notify FBI HQ, and a determination of continued use must be approved by a "senior" official at FBI HQ after consultation with the Assistant Attorney General in charge of the Criminal Division.

G. Use of informants and confidential sources where legal privileges or news media involved

1. The Informant Guidelines provide that lawyers, doctors, clergymen, and members of the news media may be used as informants or confidential sources only upon written approval by the Director or by an official at FBI HQ designated by him, with notice to the Assistant Attorney General or his designee.

2. Any such person used as an informant or confidential source must be advised that in seeking information the FBI is not requesting or advocating any breach of any legal obligation or confidentiality. If, nevertheless, any such person offers to provide such information, the offer cannot be accepted unless the supervisor determines that serious consequences, such as physical injury or severe property damage, would ensue from rejection. When such information is spontaneously provided, in circumstances that are not "serious consequences," the information is required to be recorded and not to be used in the conduct of the investigation.

H. Compensation for informants and confidential sources

The Informant Guidelines provide that:

1. the FBI may pay an informant reasonable amounts of money or provide other lawful consideration or expenses. No payment "shall be conditioned on the conviction of any particular individual," except for a published reward; and

2. in investigations of serious crimes or "the expenditure of extensive investigative resources," compensation may exceed $25,000. "The Attorney General shall be informed of any such extraordinary payment as he deems necessary."

I. Creation of enforceable rights

The Informant Guidelines expressly state that they create no right enforceable at law and place no limit on otherwise lawful prerogatives of the Department of Justice.

IV. GUIDELINES FOR FBI UNDERCOVER ACTIVITIES

A. Origins

The Undercover Guidelines were issued by the Attorney General on January 5, 1981, to take effect on or about February 1, 1981.[8]

B. Definitions

The Undercover Guidelines define an undercover operation as any investigative operation in which an undercover employee is used. They define an undercover employee as any employee of the FBI, or of another law enforcement agency working under the FBI's direction and control in a particular investigation, whose relationship with the FBI is concealed from third parties in the course of the investigation by the maintenance of a cover or alias.

"Employee" is not defined in the Undercover Guidelines. FBI officials informed the Select Committee, however, that "employee" is interpreted to mean a full-time salaried employee of the FBI or of another federal, state, or local law enforcement agency. The term is also sometimes applied to a person who is the owner of a private business who agrees to assist the FBI by providing cover for an FBI operation, even though he is not technically an employee. The Select Committee was told that in almost every case where such a private proprietary is being used to assist the FBI, there is also an actual FBI undercover employee in some part of the operation, so that the Undercover Guidelines would apply even in the absence of the private business owner.

Various provisions of the Undercover Guidelines refer to "cooperating private individuals," "cooperating person," and "cooperating individual," but do not define those terms. The relationship between those and a "confidential source," as defined in the Informant Guidelines, is nowhere described.

C. Authorization of undercover operations

1. Two categories of undercover operations can be authorized only by the Director or by an Assistant Director designated by him.

(a) The first category consists of operations that must be approved by the Director or by an Assistant Director because of the commitment of a specified amount of money or because of the proposed duration of the operation. Such approval generally is required if the operation will require more than $1,500 for property, supplies, services, equipment, or facilities; will last more than six months; or will involve the expenditure of more than $20,000.

(b) The second category consists of operations that must be approved by the Director or by an Assistant Director because of "sensitive circumstances." Sensitive circumstances are defined to include possible corrupt action by public officials or political candidates; activities of religious or political organizations; activities of a foreign government or of the news media; commission of a serious crime; interference with various confidential relationships (such as attorney/client, physician/patient, clergyman/penitent, media person/source); the possibility that an undercover employee or cooperating individual will be required to give sworn testimony in an undercover capacity; a significant risk of violence or physical injury; and a significant risk of financial loss to an innocent individual.

---

[8] The Undercover Guidelines are reprinted in Appendix D to this report.

2. All other undercover operations may be approved by an SAC of a Field Office upon his written determination that other guidelines issued by the Attorney General have been satisfied; that the proposed undercover operation is an effective means to obtain evidence or necessary information; that there is no present expectation that sensitive circumstances will arise, that the operation will last for more than six months, or that expenditures will exceed $20,000; and that the operation "will be conducted with minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner."

D. Procedure for approval where the director or designated assistant director is involved

1. In these undercover operations, the SAC applies to FBI HQ for approval of the "establishment, extension, or renewal of the undercover operation." The guidelines state that, if "FBI HQ recommends approval," it must forward the application to the Undercover Operations Review Committee ("UORC"), which, if it approves, forwards the application to the Director or to a designated Assistant Director.

FBI officials informed the Select Committee that "FBI HQ," as used in this context, has been interpreted to effect the following procedure: The application is sent to two offices in FBI HQ: the relevant substantive section (for example, the white-collar crime section) and the Undercover and Selective Operations Unit. Personnel of each of these offices review the application and consult with lawyers in the FBI Legal Counsel Division, as needed. The application will be forwarded to the Undercover Operations Review Committee only upon the written approval of the relevant substantive section chief. He, therefore, has veto power. If he does approve, the application—either in its original form or as amended to satisfy him—is forwarded, together with a covering memorandum from him, to the UORC.

2. The application must be in writing and must include the following:

(a) A description of the operation, including the "*particular* cover to be employed" and any informants or other cooperating persons; a description of the "*particular* offense or criminal enterprise under investigation, and any individuals known to be involved"; and an estimate of the operation's duration.

(b) A statement of the circumstances justifying the operation (generally including reasonable indication of criminal activity and why this type of operation is considered effective) and showing that the applicable guidelines have been satisfied, that the operation is an effective means of obtaining evidence or necessary information, and that it "will be conducted with minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner."

(c) A statement of proposed expenses.

(d) A statement that the United States Attorney or Strike Force Chief "concurs with the proposal and its objectives and legality."

E. Undercover operations review committee

Paragraph F of the Undercover Guidelines provides for an Undercover Operations Review Committee, "consisting of appropriate employees of the FBI designated by the Director, and attorneys of the Department of Justice designated by the Assistant Attorney General in charge of the Criminal Division, to be chaired by a designee of the Director." Because of that lack of specificity regarding the UORC's composition, and because the guidelines do not describe UORC procedures, the Select Committee interviewed six representatives of the FBI and of other components of the Department of Justice and obtained the following information.

On August 14, 1978, the FBI's Legal Counsel Division recommended the creation of a committee to review undercover operations. In a memorandum dated September 6, 1978, Director William H. Webster authorized the creation of the UORC.

The UORC began meeting in the fall of 1978. It had seven voting members, all from the FBI: (1) the deputy assistant director in charge of the organized crime section and of the white-collar crime section; (2) the deputy assistant director in charge of the personal and property crimes section, of the civil rights and special inquiry section, and of the terrorism program section, or his designated representative; (3) the chief of the white-collar crime section; (4) the chief of the organized crime section; (5) the chief of the personal and property crimes section; (6) a representative from the FBI's legal counsel division; and (7) a budget representative from the administrative services division. The chairman was the deputy assistant director in charge of the organized crime and white-collar sections.[9]

The voting membership of the UORC increased in the summer of 1979. Some undercover operations, including Operation Frontload, had had problems, and the Department of Justice ("DOJ") was considering forming its own, separate review committee from which approval would be required before any FBI undercover operation could commence. The FBI personnel were concerned that inordinate delays and objections would result, so the FBI and the DOJ agreed that three DOJ representatives would become voting members of the UORC. The three new members were (1) the chief of the DOJ's public integrity section, (2) the assistant chief of the DOJ's organized crime section, and (3) the assistant chief of the DOJ's fraud section. An eleventh voting member has since been added: a representative, from the FBI's technical services division, with expertise regarding the relevant contract law (for example, the laws and rules governing FBI leases of buildings and governing contracts with informants). A special assistant to the assistant attorney general in charge of the criminal division was added as a nonvoting member. At various times, FBI or DOJ representatives with particular expertise or a particular interest in issue attend UORC meetings, but they do not have votes.

---

[9] Francis M. Mullen, Jr. was the initial chairman serving until September 1979. Oliver B. Revell was the chairman from September 1979 until after Abscam's covert stage ended on February 2, 1980. Floyd Clarke is the current chairman.

Paragraph F(5) of the Undercover Guidelines provides that the UORC may recommend approval of an undercover operation "only upon reaching a consensus," and the Select Committee asked the FBI officials to describe the *de facto* meaning of "consensus." Several points emerged.

First, the UORC chairman can singlehandedly prevent any proposal from being recommended for approval. He can, for example, send the proposal back for clarification or amendment; and he can simply veto a proposal on the basis of funding problems or on the basis of other problems he believes to be dispositive. No other member of the UORC has such a veto power.

Second, as long as the chairman, the section chief of the section sponsoring the proposal (for example, the white-collar crime section), and all three DOJ representatives concur, a proposal will be recommended for approval, even if those five members are not joined by a sixth member so as to constitute a majority. Any dissenting UORC members, however, may submit a written dissent and may meet with the Director or with an assistant director to discuss the matter. Moreover, if a technical expert voices a problem, the UORC will recommend contingent approval, and the proposal will not be forwarded to the Director until the problem has been researched and a solution has been approved by the chairman of the UORC.

Third, if any of the three DOJ members of the UORC opposes the proposal, Paragraph F(5)(a) of the Undercover Guidelines requires that approval be withheld until the assistant attorney general in charge of the criminal division has been informed and has consulted with the Director. If the Director then wishes to approve the proposal and the assistant attorney general does not, the latter may, if he wishes, seek a decision from the Deputy Attorney General or from the Attorney General.

When the UORC meets to consider an application for an undercover operation, written minutes of the UORC meetings are prepared. The meetings are held on alternate Tuesdays, unless there is no proposal or too many members are unavailable. Occasionally, the chairman calls ad hoc meetings. If the UORC recommends approval of the application, the UORC prepares a written statement, pursuant to Paragraph F(4) of the Undercover Guidelines, "explaining why the undercover operation merits approval in light of the anticipated occurrence of such sensitive circumstances." The seven itemized factors in Paragraph F(3) of the Undercover Guidelines are not used as a checklist, either by the UORC in its deliberations or in the written approval statement prepared by the UORC. (It should be noted that UORC approval is required for any proposal falling within Paragraph A(1)(f)–(g) or Paragraph G of the Guidelines, but a written statement under Paragraph F(4) is not required for proposals falling within Paragraph A(1)(f)–(g) and without Paragraph B.)

Paragraphs D through F of the Undercover Guidelines expressly state that the various specified procedural and substantive requirements, including those involving the UORC, apply to "the establishment, extension, or renewal of an undercover operation"; but "extension" and "renewal" are undefined terms. Accordingly, the Select Committee asked the FBI officials to describe the circumstances, if any, in which the detailed procedures required by the Undercover Guidelines for *commencing* an undercover operation would be required for *modifying* an existing undercover operation. The officials stated that the FBI has chosen to interpret both "extension" and "renewal" as referring only to *time* considerations, not to substantive scope considerations or targeting considerations. Thus, the FBI has interpreted the term "extension" to be utterly redundant, having the same meaning as "renewal." Nevertheless, the FBI officials stated, the FBI does perform all of the steps required to commence an undercover operation whenever there is a "significant deviation" from an existing, previously approved undercover operation. Further, the FBI officials stated that a "significant deviation" occurs when there is a "change in the basic thrust of the operation or in the pattern and type of criminal activity being investigated."

It is unclear what provision in the Undercover Guidelines the FBI relies upon for its "significant deviation" test, since that language does not appear in the Undercover Guidelines. Paragraph M of the Undercover Guidelines requires the SAC to "consult with Headquarters. . . if an undercover operation is likely to involve one of the circumstances listed in Paragraphs A and B and either (a) the SAC's application to FBIHQ did not contemplate the occurrence of that circumstance, or (b) the undercover operation was approved by the SAC under his own authority." Paragraph M(2) requires the SAC in those circumstances, but only in those circumstances, to submit a written application for an amendment of the original application. Thus, the geographic scope, subject-matter scope, and identity and number of targets could change dramatically without making Paragraph M apply. Therefore Paragraph M cannot be the basis for the "significant deviation" test.

The Select Committee then asked whether the FBI's definition of "significant deviation" would include the following situation: The FBI sets up a storefront fencing operation to buy hijacked liquor; after it has operated for a while in that manner, a hijacker who does not know the store is an FBI proprietary says to the undercover agent that the police chief is going to want payment for "protection" of the store. Can the agent tell the hijacker to bring in the police chief for a bribe payment?

The FBI officials stated that a police chief is not a "public official" within the FBI's interpretation of Paragraph B(a) of the Undercover Guidelines, so that no "sensitive circumstance" would exist and bring the full approval process into play. They further stated that "public official" and other Undercover Guidelines terms are interpreted differently when used in conjunction with those guidelines than when the very same terms are used in conjunction with other guidelines or internal FBI documents. For example, "public officials" *does* include police chiefs in the FBI's "bribery guidelines." [10] Also, a state legislator is not a public official under the Undercover Guidelines, but is a public official under the bribery guidelines.

---

[10] These "bribery guidelines" are a discreet set of confidential guidelines designating the FBI official who must approve the offer of a bribe to a "public official"—generally, the more important the public official, the more senior the FBI person who can approve.

The FBI officials then stated that, even with the mayor inserted into the hypothetical, the altered circumstance in the existing storefront operation would not constitute a "significant deviation" requiring resubmission to FBI HQ, the UORC, and the Director, because an investigation of one individual, rather than of a pattern or series of criminal activities, is not an "operation" as that term, used in the Undercover Guidelines, has been internally interpreted by the FBI. In sum, the FBI has internally defined "extension," "operation," and "public official" in a manner that makes each of those terms redundant, exceedingly narrow, or inconsistent with usage in other guidelines and documents.

F. Approval by director or designated assistant director

Either the Director or designated assistant director may approve an operation recommended by the UORC; but only the Director may approve an operation if there is a significant risk of violence or physical injury to an individual or if the operation will be used to infiltrate a group under investigation as part of a domestic security investigation.

G. Duration of operation

An undercover operation may continue no longer than six months, unless within that time it is reauthorized; the reauthorization must be by the Director or by an assistant director in all cases.

H. Authorization of participation in otherwise illegal activities

No FBI official may authorize an undercover employee or a cooperating individual to participate in illegal activities except (1) "to obtain information or evidence necessary for paramount prosecutive purposes," (2) to maintain cover, or (3) to prevent, or to avoid the danger of, death or serious bodily injury.

Because this is a "sensitive circumstance," an undercover operation in which this type of activity may occur requires approval by the Director or by an assistant director after review by the Undercover Operations Review Committee; and, if the otherwise illegal activity involves a significant risk of violence or of serious injury, the Director's approval must be obtained. Any SAC, however, can provide "emergency authorization to commit or engage in any otherwise illegal activity." An SAC also may approve, even in the absence of an emergency, participation in the purchase of stolen or contraband goods or in a "nonserious misdemeanor."

I. Authorization of creation of opportunities for illegal activity

The guidelines for these operations are basically as follows:

1. Entrapment should be scrupulously avoided.
2. The corrupt nature of the activity must be reasonably clear to potential subjects.
3. There must be a reasonable indication that the undercover operation will reveal illegal activities.
4. The nature of any inducement in view of all circumstances must be justified.

The guidelines provide that inducements may be offered to particular individuals, even if there is no reasonable indication that those particular individuals have engaged, or are engaging, in the illegal activity that is under investigation, in any of three circumstances:

(1) if specifically authorized in writing by the Director;

(2) if the UORC has determined, "insofar as practicable," that there is a reasonable indication that "the individual is engaged, has engaged, or is likely to engage in illegal activity of a similar type"; or

(3) if the UORC has determined, "insofar as practicable, that the opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity."

J. Monitoring and control of undercover operations

The Undercover Guidelines provide for FBI consultation periodically during an operation with the designated representative of the Department of Justice and for consultation with representatives of the Department of Justice when serious legal, ethical, or policy questions are considered or when an unforeseen sensitive circumstance arises.

K. Emergency authorization

The Undercover Guidelines allow an SAC to approve the initiation of emergency undercover operations to protect life or substantial property, to apprehend or to identify a fleeing offender, to prevent the hiding or destruction of physical evidence, or to avoid other grave harm when grounds exist on which authorization could be obtained under these guidelines; but written application for approval must be submitted to FBI HQ within 48 hours after the emergency authorization.

L. Investigative interviews

Paragraph K of the Undercover Guidelines provides, "Notwithstanding any other provision of these guidelines, routine investigative interviews that are *not* part of an undercover operation may be conducted without the authorization of FBIHQ. . . . These include so-called 'pretext' interviews, in which an FBI employee uses an alias or cover identity to conceal his relationship with the FBI." The guidelines do not define "routine investigative interviews" or "pretext" interviews or distinguish them from "inquiries," from "investigations," or from "operations."

M. Crimes by undercover agents

FBI officials confirmed to the Select Committee that the Undercover Guidelines do permit, under Paragraphs B(1), G(a) and N, the commission of serious crimes (including crimes of violence), interference with an attorney-client privilege, and interference with other privileges by FBI undercover employees. The Undercover Guidelines give no indication of what factors will justify the use of violence, the commission of a crime, or interference with a privileged relationship.

CHAPTER SIX—THE ABSCAM OPERATION: AN EXAMPLE OF THE BENEFITS AND RISKS OF A LONG-TERM, COMPLEX FBI UNDERCOVER OPERATION AND A DEMONSTRATION OF THE NEED FOR MODIFICATIONS TO EXISTING STATUTES, GUIDELINES, AND OPERATIONAL PROCEDURES

This Chapter extensively examines various aspects of the undercover operation known as Abscam in an attempt to analyze the benefits and risks inherent in law enforcement undercover operations. Abscam is probably the most complex, and certainly the most controversial, undercover operation conducted by the FBI. It produced numerous convictions in the area of public corruption. It also has become the object of extensive criticism for the way in which it was managed and for the risks it posed to civil liberties.

The Select Committee has examined several of the allegations of mismanagement and of injustices to particular defendants and suspects. This Chapter begins with an examination of the way in which Abscam suspects were selected, of the way in which the investigation shifted focus, and of the degree to which the undercover operation relied upon the uncorroborated statements of corrupt middlemen over the course of the investigation. It then explores the procedures by which the FBI managed evidence and attempted to supervise the chief informant. This Chapter then analyzes specific allegations of injustice to suspects of the investigation. Finally, it concludes with a brief discussion of several allegations of conflicts of interest and of other improprieties in Abscam.

The Select Committee has not attempted to resolve each allegation that has been leveled against the Abscam operation. Rather, this Chapter focuses on a number of the issues that the Select Committee believes are relevant to its consideration of legislative and administrative changes. A detailed, but not exhaustive, chronology of the events of Abscam appears as Appendix A to this Report.

The Abscam undercover operation lasted from early 1978 through January 1980. The Select Committee's investigation has focused upon this investigative phase of Abscam. The controversy concerning the conduct of Department of Justice officials in the subsequent prosecutorial phase is not treated in detail. In examining Abscam as an example of an undercover operation, it is important to note that the Department of Justice and the FBI promulgated in 1980 and 1981 formal guidelines governing criminal investigations, undercover operations, and the use of informants and confidential sources. Thus, these subsequent actions may have reduced the chances of reoccurrence of some of the failures that materialized in Abscam.

I. ALLEGATIONS OF TARGETING

Section 3(1) of Senate Resolution 350 directs the Select Committee to investigate "alleged targeting by any component of the Department of Justice of particular individuals . . . without justification . . . ." In its investigation and study of the Abscam operation, the Select Committee has found no indication that, before their names were mentioned to FBI operatives by unwitting middlemen, the FBI had targeted any of the 20 individuals whom the middlemen brought before the FBI's videotape cameras for meetings with undercover operatives. The Select Committee also has found no evidence that, for any purpose other than a valid law enforcement purpose, the FBI ignored or abandoned any investigative lead relating to any individual.

The Select Committee finds, however, that in one instance, by attempting to induce a middleman to involve a public official in corrupt matters after the middleman had raised that official's name in an innocuous context, Weinberg essentially targeted that official. The Select Committee further finds that, after FBI HQ had approved Abscam as a long-term undercover operation targeted at specified types of criminal activity, the FBI's Abscam field operatives and field supervisors descriptively targeted politicians as a group, later descriptively targeted members of Congress as a narrower group, and still later descriptively targeted even narrower groups. In none of these instances was FBI HQ asked to approve the targeting of a new group.

Finally, the Select Committee finds that, in deciding whether to investigate particular public figures in Abscam, the FBI excessively relied upon the uncorroborated representations of unwitting, corrupt middlemen. The representations elicited and accepted from those middlemen were unduly vague. Too often, those representations were, and did not have to be, elicited only by the informant, rather than by an FBI undercover special agent. In addition, the decision whether to investigate an individual named by a middleman was in several instances made by ranking FBI officials without their having been provided a thorough or accurate report of the available information tending to show the unreliability of the representations of the middleman.

A. TARGETING OF INDIVIDUALS BY NAME

1. Individuals for whom videotaped meetings were approved by FBI HQ

During the course of the covert stage of the Abscam operation, FBI HQ granted approval in 24 instances for FBI undercover operatives, posing as representatives of Abdul Enterprises, to hold a videotaped meeting with a specified public official and, if specified conditions were met, to offer the public official a bribe.[1] Twenty of those public officials eventually attended meetings with undercover operatives in front of FBI videotape cameras. In none of those 20 instances did an FBI informant or undercover special agent first mention the public official's name to a middleman; rather, in each such instance an unwitting middleman first named the public official and suggested to an undercover operative that the official was corrupt. Specifically:

---

[1] Meetings of the same nature with two other public officials were approved by some of the officials at FBI HQ whose approval was required, but approval was withdrawn before the Director was asked to grant his approval and before any approval was communicated to the operatives in the field.

Middleman William Eden first raised Mayor Angelo Errichetti's name in a recorded conversation on November 16, 1978. ([Deleted [2]])

Errichetti first raised the name of Kenneth MacDonald, Vice Chairman, New Jersey Casino Control Commission, in a recorded conversation on January 9, 1979. ([Deleted])

Errichetti first raised the name of Senator Harrison Williams in an unrecorded, but contemporaneously memorialized, meeting with Special Agent John M. McCarthy on January 10, 1979. ([Deleted])

Middleman Alfred Carpentier first raised the name of INS official Alexander Alexandro, Jr., in an unrecorded, unmemorialized conversation with Special Agent Amoroso on March 23, 1979. (*Alexandro* Trial Tr. 63–66.)

Errichetti first raised the name of Representative Michael "Ozzie" Myers by writing it on a piece of paper that he then gave to Weinberg at an unrecorded meeting on March 30, 1979. ([Deleted]) Errichetti later raised Myers' name in the context of the "asylum scenario" on July 29, 1979, in a recorded conversation. (*Myers* Gov't Trial Ex. 19A, at 1; *Lederer* Gov't Trial Ex. 1A, at 1.)

Errichetti first raised the name of [deleted] [3], [deleted] New Jersey [deleted], in a recorded conversation on April 9, 1979. ([Deleted])

Weinberg first mentioned the name of Representative John Jenrette in a recorded conversation on April 18, 1979, with middleman John Stowe. (*Jenrette* Def. Trial Ex. 31, at 1.) It appears, however, that earlier in that conversation, before the recording had begun, Stowe had first raised Jenrette's name. Further, on October 18, 1978, Stowe had told Weinberg in a recorded conversation that he, Stowe, had a Congressman friend who was "as big a crook" as was Stowe, although the name of the Congressman was not mentioned at that time. (*Jenrette* Def. Trial Ex. 28, at 3.)

Errichetti first raised the name of Representative Raymond Lederer in a recorded conversation on July 29, 1979. (*Lederer* Gov't Trial Ex. 1A, at 1.)

Errichetti first raised the name of Mario Noto, an official in the Immigration and Naturalization Service, in a recorded conversation on September 14, 1979. (*Myers* Def. Trial Ex. T-9.)

Criden first raised the name of Representative Frank Thompson in a recorded conversation on September 27, 1979. (*Thompson* Gov't Trial Ex. 1A, at 3.)

Middleman Joseph Silvestri first raised the name of New Jersey [deleted] in a recorded conversation on October 5, 1979. ([Deleted])

Weinberg first mentioned the name of Representative John Murphy in a recorded conversation on October 10, 1979, but the context in which that occurred is important. On October 9, 1979, the following dialogue between Representative Thompson and DeVito had occurred:

---

[2] The omission of a citation to a confidential document is identified by "[Deleted]." *See* pp. V–VI *supra*.

[3] The omission of sensitive information is identified by "[deleted]." *See* pp. V–VI *supra*.

> **Thompson**: You talk to the members of Congress whom I suggest who come up to visit with you or to have lunch with you.
>
> **DeVito**: Well, that's super . . . .
>
> **Thompson**: And that includes some people from New York on a preliminary basis.
>
> And the first guy you might see might well be a pal of mine from New York. And, if he comes, I'll come with him. (*Thompson* Gov't Trial Ex. 7A-5, at 9-10.)

In addition, in a conversation recorded earlier that day, Thompson had said that one of the Congressmen who might help was one who had assisted Somoza with his immigration problems. (*Thompson* Gov't Trial Ex. 7A-1, at 10.) Representative Murphy was from New York and had assisted Somoza. Then, on October 10 the following dialogue occurred between Weinberg and Criden, who had attended the Thompson meetings a day earlier:

> **Criden**: The next guy that, uh, that he's [Frank Thompson] suggesting is, maybe, ah, even a heavier hitter than him.
>
> **Weinberg**: Who's that? The guy from New York?
>
> **Criden**: Yeah.
>
> **Weinberg**: I think I know his name. Is it an Irishman?
>
> **Criden**: Yup. Begins with an 'R'.
>
> **Weinberg**: An 'R'? I thought it begins with an 'M'.
>
> **Criden**: Well, the guy's, uh, got a lot to do with boats and maritime.
>
> **Weinberg**: Murphy?
>
> **Criden**: No. Ryan . . . Chairman of the Maritime. (*Thompson* Gov't Trial Ex. 8A.)

Further, in a recorded conversation on October 17, 1979, the following dialogue occurred:

> **Weinberg**: Who the fuck is coming?
>
> **Criden**: Murphy.
>
> **Weinberg**: You dumb fuck; you gave me "Ryan."
>
> **Criden**: I know, I gave you the wrong guy. Murphy, you know who Murphy is? Murphy is the Chairman of the House Committee for Immigration. Not immigration, Maritime. Ships. He's the number one man in the Merchant Marine and the Maritime. Top guy in the country in the legislature. (*Thompson* Gov't Trial Ex. 12A, at 1.)

Thus, although Weinberg first mentioned Murphy's name, Criden and Thompson already had stated that a Congressman meeting Murphy's description was corrupt, and Weinberg was merely attaching the correct name to their description of Murphy.

Silvestri first raised the name of Representative [deleted] in a recorded conversation on October 17, 1979. ([Deleted])

Silvestri first raised the name of Senator Larry Pressler in an unrecorded, unmemorialized telephone conversation with Tony DeVito (Special Agent Anthony Amoroso) on November 7, 1979.

([Deleted]; Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.)

Criden first raised the name of Representative John Murtha in a recorded conversation on November 8, 1979. (*Thompson* Gov't Trial Ex. 18A, at 23.)

Eugene Ciuzio first raised the name of Representative Richard Kelly in a recorded conversation on December 19, 1979. (*Kelly* Gov't Trial Ex. 1C, at 30.)

Criden and Johanson first raised the name of Philadelphia City Councilman Harry P. Jannotti in a recorded conversation on January 18, 1980. (*Jannotti* Gov't Trial Ex. 2E, at 53–56.)

Criden first raised the name of Philadelphia City Councilman Louis Johanson in a recorded conversation on January 18, 1980.[4] (*Jannotti* Gov't Trial Ex. 2D, at 4, 19.)

Errichetti first raised the name of Philadelphia City Council President George Schwartz in a recorded conversation on May 23, 1979. ([Deleted]) Middleman George Katz also raised Schwartz's name in a corrupt context. ([Deleted])

Representative Myers first raised the name of Pennsylvania legislator [deleted] in a recorded conversation on January 24, 1980. ([Deleted])

Middlemen also first raised the names of three of the four public officials for whom FBI HQ approved a videotaped meeting but who never attended such a meeting:

Errichetti first raised the name of Representative [deleted] by writing it on a piece of paper that he gave to Weinberg at an unrecorded meeting on March 30, 1979. ([Deleted])

Criden first raised the name of Representative [deleted] in a recorded conversation on September 26, 1979. (*Thompson* Def. Trial Ex. MD, at 4.)

Criden first raised the name of Representative [deleted] in a recorded conversation on September 27, 1979. (*Thompson* Gov't Trial Ex. 1A.)[5]

Of the 24 public officials whom FBI HQ authorized the Abscam operatives to invite to meetings at which bribes would be offered, the only one whom a middleman had not in some fashion first claimed to be a corrupt individual was Representative William J. Hughes. Middleman Joseph Silvestri first raised the name of Representative Hughes in a recorded conversation on October 5, 1979.

---

[4] Johanson's name in fact arose much earlier in Abscam, on July 14, 1979, when Errichetti put him on the telephone to talk to Weinberg about financing for a casino. ([Deleted]) Johanson also attended the meeting on *The Left Hand* in Florida on July 26, 1979. Both of those instances provided some basis for believing that he might be corrupt, especially because of his associations with Criden and Errichetti.

[5] Middlemen also first raised the names of the two public officials for whom some FBI officials first approved videotaped meetings and then withdrew that approval before the names were submitted to the Director. Specifically, Weinberg first mentioned the name of Senator [deleted] in a recorded conversation on August 5, 1979, with Errichetti and DeVito (Amoroso). (*Myers* Gov't Trial Ex. 1A, at 1.) He did so, however, when DeVito first joined him and Errichetti, by saying to DeVito, "Hey, you know who he can get for us? . . . He can get Senator [deleted]." Errichetti immediately said, "I'm working on that so far," thereby suggesting that he had begun to attempt to involve Senator [deleted] before the meeting. Further, on July 31, 1979, Errichetti had told Weinberg in a recorded conversation that he hoped "to have two from Florida, *one from [deleted]*, and maybe one from California." (*Lederer* Gov't Trial Ex. 3A (emphasis added).) All of those circumstances strongly suggest that Errichetti already had raised Senator [deleted] name by the time Weinberg mentioned it.

Middleman Howard Criden first raised the name of Representative [deleted] in a recorded conversation on August 7, 1979. (*Lederer* Gov't Trial Ex. 7A.)

He did so in the context of a long monologue about the infighting among various members and factions of the Democratic Party in the State of New Jersey. Specifically, after having talked about disputes between [deleted] and Angelo Errichetti and about the debilitating effect of those disputes on the Democratic Party, Silvestri said, "So [deleted] the guy who holds them all together. But [deleted] the guy that holds Congressman Hughes down so he don't go too crazy." ([Deleted]) No other mention of Representative Hughes occurred during the October 5 conversation. Nor was he mentioned again until October 17, 1979, when the following dialogue between Weinberg and Silvestri occurred at the end of a long conversation:

> WEINBERG: Now, how about Hughes from, ah (unintelligible)?
>
> SILVESTRI: Hughes is, Hughes is the Congressman from Atlantic City.
>
> WEINBERG: Yeah.
>
> SILVESTRI: You know that.
>
> WEINBERG: Right.
>
> SILVESTRI: All right. I, ah, I don't know if I can get Hughes over the weekend, or have him do it in, ah, in Washington. I'll probably do two up here, and two in Washington. You want 'em spread out a week apart, right? ([Deleted])

Thus, although Silvestri first mentioned Representative Hughes' name, he did so in a context that by no means made it clear that Silvestri was suggesting that Representative Hughes was corrupt; rather, the name was a mere passing reference in the middle of a protracted discussion of the factionalism within the New Jersey Democratic Party. Early portions of the October 17 tape further suggest that Silvestri may not have intended on October 5 to impugn the integrity of Congressman Hughes or of any other public official. On October 9 the bribe meetings for Representative Thompson occurred. Early in the conversation on October 17, when discussing the Thompson meetings, Silvestri said to Weinberg, "But I didn't have any idea what you guys were doing. . . . You, you have never told me what you're asking these guys for." ([Deleted]) Therefore, it appears that on October 17, when Weinberg expressly asked Silvestri to try to get Representative Hughes, the FBI had no reasonable basis for allowing Weinberg to make Representative Hughes a target of the investigation.

Perhaps the strongest confirmation of the absence of any incriminating information about Representative Hughes, however, is an internal FBI document prepared for Assistant Director Revell shortly after the covert stage of Abscam had ended. The memorandum unequivocally states that there was no "derogatory information concerning" the Congressman. ([Deleted]) Unfortunately, a similar assessment appears not to have been made and acted upon in a timely manner in October 1979.[6]

---

[6] Because of the Hughes incident, the Select Committee cannot agree with the statement of Executive Assistant Director Mullen, who testified:

"I can state unequivocally that there was no targeting of public officials. There was no mention of any elected public officials' name by the FBI undercover operatives prior to that name being

Continued

Because the Select Committee has no evidence that, before middlemen raised their names, the FBI had targeted the individuals who attended videotaped meetings with FBI undercover operatives, one specific item should be mentioned. In July 1982 a reporter obtained, and disclosed a portion of the contents of, a memorandum dated October 5, 1979, written by then-Deputy Assistant Attorney General Irvin B. Nathan and addressed to several attorneys in the Department of Justice having major Abscam responsibilities. The memorandum was three pages long, single-spaced, and entitled "Prosecutorial Coordination of 'ABSCAM' Investigation." As its title suggested, the memorandum discussed the manner in which the attorneys in the four jurisdictions having Abscam responsibilities—New York, New Jersey, Pennsylvania and Washington, D.C.—should coordinate their investigative and prosecutorial tasks.

The memorandum's final paragraph noted that the investigation would not "continue for an unduly extended period of time." (Several other documents in the files of the Department of Justice show that termination of the operation had been considered months earlier; for example, on July 24, 1979, several FBI personnel and a strike force attorney met and concluded that the operation would terminate by the end of October 1979.) It was in this context that the memorandum then stated:

> Notwithstanding the existence of identified potential targets as to whom cases have not yet been completed, this phase of the investigation will be terminated, after a balancing of all of the potential considerations—including the right of the electorate to be apprised in a timely fashion of the charges against incumbent officeholders—by the Assistant Attorney General of the Criminal Division and the Director of the FBI, in close consultation with all of the affected prosecutors, at such time as the Assistant Attorney General and the Director deem appropriate.

The reporter cited the parenthetical portions of this statement—"including the right of the electorate to be apprised in a timely fashion of the charges against incumbent officeholders"—and concluded that it evinced improper political targeting. The Select Committee finds that conclusion unsupported by the memorandum itself, when the memorandum is considered in its entirety, by the other documents the Select Committee has reviewed, by the Select Committee's interviews and examination of Nathan, and by the other circumstances.

It should first be noted that the memorandum was written only ten months before most of the 1980 congressional primary elections. The Department of Justice had this choice: either it could attempt to finish the covert investigation, seek indictments, and conduct trials before the summer primaries of 1980 so that the electorate would know, in time to cast informed votes, whether the incum-

---

raised by one of the currupt influence peddlers. "(Sel. Comm. Hrg., July 21, 1982, at 20 (testimony of Francis M. Mullen, Jr.); *see id.* at 55–56.)

Mullen's assertion is accurate in only the narrowest possible sense that Silvestri had mentioned Representative Hughes' name before Weinberg had targeted him. The record reveals, however, no incriminatory reference to Hughes by Silvestri or any other middleman before October 17, 1979.

bents were criminals, or it could delay disclosure until after the primaries or after the general elections so as to avoid the risk of prejudicing the election campaigns of Congressmen who might be prosecuted but found innocent. The former course of action would subject the Department of Justice to criticism such as that voiced by the reporter, but the latter course of action would subject the Department to criticism for hiding information in order to help reelect the incumbents. Faced with this choice, Nathan opted to attempt to obtain a final resolution of all issues before the 1980 elections.

Further, the memorandum stated that the decision of when to terminate would be made not by the author, Nathan, but by Heymann and Webster in consultation with all affected prosecutors, of which there were nearly a dozen. It seems quite unlikely that Nathan would have memorialized and widely disseminated a political targeting conspiracy of such breadth, or even that several career prosecutors from several states, a Harvard law professor (Heymann), a former federal judge and the director of an independent law enforcement agency (Webster), and all of the addressees of the memorandum would have openly conspired to select targets for political reasons.

2. *Individuals for whom FBI HQ never approved a videotaped meeting*

In addition to the 24 public officials for whom bribe payments were conditionally authorized by FBI HQ, at least 34 other public officials were named in recorded conversations in a manner suggesting that those officials might be corrupt. The public officials so named included Senators, Representatives, appointed federal officials, state legislators, governors and lieutenant governors, mayors, and officials elected or appointed to various state and local governmental bodies. In almost every instance, a middleman, rather than Weinberg or an undercover special agent, first mentioned the public official's name.

The only clear exception is the instance in which Weinberg first raised the name of Hamilton Jordan, Assistant to President Carter. On September 14, 1979, in a conversation among Weinberg, Tony DeVito (Special Agent Anthony Amoroso), and Errichetti, the following dialogue occurred:

> WEINBERG: You know Hamilton Jordan?
>
> ERRICHETTI: Not personally, no. I know I have talked to him on the phone to him, but I don't know him in person.
>
> WEINBERG: Will you reach out (inaudible)?
>
> ERICHETTI: Tell me what you want, and I'll, I'll, I'll search out.
>
> DEVITO: I don't know. I think we ought to stay away from him now. He's got a lot, a lot of heat on him.
>
> ERRICHETTI: What kind of favor do you want is not Hamilton Jordan.
>
> WEINBERG: Well, someone to get close to (inaudible) Vesco.
>
> ERRICHETTI: Well.
>
> DEVITO: Well, I don't know.

> Errichetti: Did he tell you about Vesco with, uh, that Grand Jury?
>
> DeVito: No, no, no. I want to just stay away from that. There, there's too many guys. That Vesco's too much of a problem. Ange, I know you want to do a favor for a guy, but uh. . . .
>
> * * * * * * *
>
> DeVito: No, stay away from that thing. ([Deleted])

At the *Myers* post-trial due process hearing, during cross-examination by Errichetti's lawyer, Weinberg testified about the Jordan incident as follows:

> Q. Well, do you recall you asked Errichetti to set up a meeting with Hamilton Jordan?
>
> A. I remember saying that.
>
> Q. Did you have any background on Hamilton Jordan that would show that——
>
> A. I just wanted to see if he knew Hamilton Jordan, because he's throwing a lot of names; so I mentioned it to see if he knew him. If he was saying, "Yes," we figured he was bullshitting us up again. *(Myers* D.P. Tr. 4380.)

The tape of the September 14, 1979, conversation plainly shows that Weinberg first raised Jordan's name, and Weinberg's *Myers* testimony confirms that he did so. The September 14 tape also shows that, immediately after Weinberg had raised Jordan's name, Special Agent Amoroso, in the role of Tony DeVito, told Errichetti not to try to contact Jordan. There is no evidence that Weinberg or any undercover agent ever again raised Jordan's name with an Abscam middleman. Accordingly, the Select Committee concludes that Weinberg's raising of Jordan's name on September 14, 1979, was not prompted by the FBI and did not result in Jordan's being targeted for investigation. Nevertheless, Weinberg did improperly atttempt to target Jordan and should have been severely criticized for having done so, regardless of his motive.

The Select Committee also notes that Weinberg appears to have raised financier Robert Vesco's name in the September 14 conversation and that Amoroso told Errichetti not to pursue that matter, either. It is unclear whether Amoroso did so because Weinberg, rather than a middleman, had first raised Vesco's name, because Vesco was not a public official, or because Amoroso was attempting to prevent anything from occurring that might interfere with the ongoing federal investigation of Vesco. In any event, both the Jordan and the Vesco instances in the September 14 conversation suggest that improper targeting might have obtained had DeVito not been present to rectify Weinberg's errors. This again demonstrates the risk of allowing someone like Weinberg to play a long-term central role in an undercover operation and to engage in hundreds of private conversations with suspects and middlemen during the course of the operation.

Weinberg is alleged to have raised the names of two other public officials before a middleman had mentioned them. Middleman William Rosenberg testified to the Select Committee that Weinberg had first mentioned the names of Senators [deleted] and [deleted] and had asked Rosenberg whether he knew them and would attempt to have them accept bribes in return for help with immigration legislation. (Sel. Com. Hrg., Sept. 9, 1982, at 61–62 (testimony of William Rosenberg).) Weinberg, on the other hand, has testified that Rosenberg first raised the names of those public officials. (*Myers* D.P. Tr. 4385–86.)

The first recorded mention of Senator [deleted] or Senator [deleted] in Abscam occurred on September 10, 1979, in a conversation between Weinberg and Rosenberg at the JFK Hilton in New York:

> WEINBERG: So you have good news for me, or what?
>
> ROSENBERG: Well, I don't know whether I've got good news for ya or not. Yeah, I don't know whether I have good news for you or not. It's ah, —
>
> WEINBERG: Did you reach out for them, or what?
>
> ROSENBERG: One guy, [deleted], doesn't know if he's going to run.
>
> * * * * * * *
>
> ROSENBERG: [deleted] wants to know if I have to register as a private agent, foreign corporation. Both of them and a fellow by the name of [deleted] who's at the House of Representatives.
>
> * * * * * * *
>
> WEINBERG: [deleted] we would definitely like, and we'd like [deleted]. (*Kelly* Gov't Trial Ex. 5-C, at 1–2, 6.)

The tape makes clear that Rosenberg previously had learned of the asylum scenario (*see id.* at 1–2) and that he and Weinberg previously had discussed "reaching out" for public officials. Rosenberg's immediate reference to Senators [deleted] and [deleted] when Weinberg asked whether Rosenberg had "reached out for them" but did not identify "them," strongly suggests that those two Senators had been named and discussed at some earlier date.

The Select Committee has reviewed all Rosenberg tape transcripts and has listened to numerous tapes for the period between July 14, 1979 (the earliest likely date of the creation of the asylum scenario), and September 10, 1979, and has found no discussion of the asylum scenario, of Senator [deleted], or of Senator [deleted]. On August 24, 1979, however, the following dialogue occurred:

> WEINBERG: *We want to get started in* [deleted] for if gambling comes. We want to start makin' the connections.
>
> ROSENBERG: This'll take, uh, to my judgment, about three to five years here.
>
> WEINBERG: (Inaudible) now's the time to (inaudible).
>
> ROSENBERG: But ground work can be laid. Absolutely.
>
> WEINBERG: Ya know.
>
> ROSENBERG: Absolutely.
>
> WEINBERG: See a few guys. Take care of 'em. Let 'em know who, who you're with.
>
> ROSENBERG: Absolutely.
>
> WEINBERG: (Inaudible)

ROSENBERG: Ya gotta show me how you do it, so I know what I'm doing. I gotta do it with circumspection and very—

WEINBERG: Well, the first thing—

ROSENBERG: Carefully.

WEINBERG: —is ya gotta get up to the politicians.

ROSENBERG: Well, of course, that's what I'm talking about.

WEINBERG: *So, do you know any of 'em around here?*

ROSENBERG: Of course.

WEINBERG: We'll start (inaudible) out.

ROSENBERG: I don't know who's—I don't know who's gonna be the major sponsors in the legislature.

WEINBERG: Once you get your foot in the door—

ROSENBERG: But, I'll get it.

WEINBERG: —then we'll spread the way.

ROSENBERG: I'll get it.

WEINBERG: (Inaudible) give us a couple that we can get to meet with—

ROSENBERG: Okay. ([Deleted] (emphasis added).)

This tape plainly shows that Weinberg raised the issue of corrupt politicians and that Weinberg specifically asked Rosenberg to seek to involve corrupt politicians from the State of [deleted]. Because the August 24 conversation was quite general, however, it seems likely that, before the September 10 conversation in which Rosenberg immediately referred to Senators [deleted] and [deleted], Weinberg and Rosenberg had had another conversation about politicians from [deleted] and that in that conversation the discussion had focused on those two Senators. Because Weinberg's testimony and Rosenberg's testimony as to who first raised the Senators' names are in conflict, and because neither Weinberg nor Rosenberg is at all credible in the absence of extrinsic corroborating evidence, the Select Committee cannot determine which of the two Abscam participants first mentioned Senator [deleted] or Senator [deleted].[7]

B. TARGETING OF GROUPS BY REFERENCES TO POLITICAL PARTIES OR GEOGRAPHIC LOCATIONS

The FBI can select a target of an undercover operation not only by having an undercover operative suggest the target's name to an unwitting middleman, but also be describing the target in a manner that ensures that the middleman will recognize the description. Thus, for example, the FBI could target an individual by suggesting his name to a middleman, but the FBI could achieve the same result by expressing to the middleman a corrupt interest in a person having specified physical characteristics or a specified office or other specified attributes. Targeting of this nature can be so specific that a single individual is targeted, or it can be more general in a variety of ways, thereby targeting a particular group, rather than a particular individual.

---

[7] Just as the Select Committee cannot determine what Weinberg and Rosenberg said to each other, the FBI and Department of Justice, it appears, cannot make that determination. This further illustrates the danger to innocent persons that is presented by investigative procedures permitting an informant to have numerous unrecorded conversations with corrupt middlemen and permitting special agents to fail to debrief the informant and to memorialize the debriefing promptly after the unrecorded conversations.

The names of Senators [deleted] and [deleted] were never submitted to FBI HQ in a request for approval to offer a bribe, because Rosenberg never informed the Abscam operatives that either Senator had agreed to meet at a specific time and place. Weinberg and Rosenberg alluded to the two Senators on a few occasions ([deleted]), but on October 21, 1979, Rosenberg told Weinberg that Senator [deleted] could not be bribed and that Rosenberg had not "got back to" Senator [deleted]. (*Kelly* Gov't Trial Ex. 6–C).

On January 27, 1981, Deputy Attorney General Charles B. Renfrew sent a letter to Senator [deleted] confirming that Rosenberg had mentioned the Senator, acknowledging that Rosenberg had admitted that his statements about the Senator had been lies, and expressing regret for any inconvenience that may have been caused to the Senator by the defendants' having made public the mention of his name by Rosenberg.

Targeting of an individual or of a group in such a manner—a manner that conveniently can be termed "descriptive targeting"—raises the same dangers that are raised when a law enforcement agency targets individuals by naming them. One such danger is that innocent persons will be subjected to investigations in the absence of articulable facts supporting a reasonable suspicion that they have committed, are committing, or are likely to commit criminal acts—which is to say, in the absence of a justifiable basis for investigating those persons rather than any others. A related danger is that law enforcement agents or officials will select individuals for investigation on the basis of criteria unrelated to legitimate law enforcement purposes—criteria such as political opposition or personal animosity.

Descriptive targeting occurred in Abscam on the basis of political party and on the basis of geographic location.[8] One instance of this occurred on October 9, 1979, in a conversation among DeVito (Special Agent Amoroso), Weinberg, and Criden. The three men had been discussing the number of Congressmen that Criden could provide for corrupt purposes, and the following dialogue then occurred:

> CRIDEN: That's what you would prefer, to have guys spread out all over the country?
>
> DEVITO: Well, I would. I would. And I tell you what I would prefer, too: Like I have discussed with you, and I even mentioned it to Angelo [Errichetti], it would be nice to have some guys that are Republicans in here, too. Only for the fact that it doesn't look like the push would be comin' from just, ya know, one group . . . . (*Thompson*

---

[8] Of course, whenever the FBI initiates an undercover operation in a particular one of the 59 Field Offices and chooses to use a particular informant, some degree of implicit descriptive targeting occurs. By locating a fencing storefront in Boston, rather than in Denver, and by using an informant who lives in Boston, the FBI makes it more likely that thieves in the Northeast will be caught than that thieves in the Rocky Mountains will be caught, more likely that thieves in Massachusetts will be caught, and more likely that thieves will be caught than that narcotics dealers will be caught by the undercover operatives.

That degree of targeting is in most respects inevitable and intentional, however; when approval to initiate an operation is being sought, such targeting presumably is based upon information that the type of crime being investigated is occurring in the geographic area being investigated. For example, if the FBI has a reasonable suspicion, based upon articulable facts, that there has been hijacking in the Boston area, it is reasonable to approve an undercover operation in the Boston area; however, absent information about a wider area, it would be unreasonable to investigate the whole New England region. If the requisite information exists, if it supports a reasonable suspicion, and if FBI HQ makes such a determination pursuant to sound procedures, the FBI cannot be faulted for that targeting. Unfortunately, neither the FBI nor other components of the Department of Justice appear to have any procedure or requirement that prevents further such targeting from occurring after an undercover operation has been approved and initiated; and it is not clear that applications to initiate undercover operations are, before being approved, carefully restricted to the subject, geographic area, and suspects justified by the articulable facts stated in the application.

Gov't Trial Ex. 7A-4, at 3; *see Thompson* Gov't Trial Ex. 7A-5, at 9.)

This excerpt shows that, however sound his motive might have been in seeking to ensure that middlemen did not bring in only Democrats and thereby create the appearance of targeting, Special Agent Amoroso did not leave the choice of targets to unguided, unwitting middlemen; rather, he attempted to induce Errichetti and Criden to bring in some Republicans. The excerpt also shows that, rather than allowing the middlemen to focus on their own geographic area, Amoroso encouraged them to try to bring in public officials from other parts of the country. Thus, even if Amoroso's motive was beneficent, the risk exists that the motive of some other undercover operative in some future investigation might be more sinister.

A similar descriptive targeting incident occurred on September 18, 1979. In a conversation with Criden, Weinberg said, "Okay, now, the only other thing I want to ask you is, How about some Republicans? Doesn't it look bad it's all Democrats?" *(Thompson* Def. Trial Ex. MC.)

Furthermore, the Abscam files provided to the Select Committee contain no information that could be said to support a reasonable suspicion that Republican Congressmen as a group or Congressmen from areas other than the Atlantic seaboard as a group had committed, were committing, or were likely to commit corrupt acts pertaining to immigration or to any other matter. By trying to induce middlemen to involve Republicans and Congressmen from other parts of the country, Amoroso was therefore shifting the focus of the undercover operation without a justifying predicate.

C. Selection of Investigative Targets by Reliance Upon the Representations of Unwitting Middlemen

As noted above, in almost all of the instances in which FBI HQ authorized the Abscam undercover operatives to hold a videotaped meeting with a particular public official and, if specified conditions were met, to offer that official a bribe, an unwitting middleman had first named that public official in a manner suggesting that the official was corrupt. In fact, the government's general practice in Abscam was to rely upon the uncorroborated representations of middlemen that particular public officials would accept bribes.

Those representations were usually, but not always, completely uncorroborated. First, in virtually every instance, the FBI obtained no extrinsic evidence that the named public officials had previously accepted or solicited a bribe. Second, in most instances the FBI obtained no extrinsic evidence that the named public officials had committed, were committing, or were likely to commit a crime of political corruption, fraud, or breach of trust. Third, in most instances the FBI obtained no extrinsic evidence that the named public officials had committed, were committing, or were likely to commit any other crime.[9] Fourth, in most instances the FBI obtained no detailed evidence showing that the middlemen knew the named public officials, knew those officials well enough to know of their corrupt activities, or knew them well enough to approach them about a possible bribe. Fifth, in several instances the FBI did not even have a tape of a conversation in which the middleman unequivocally stated that the named public official would take a bribe. Sixth, in most instances the FBI had obtained no representation by the middleman that the public official had been told that he would have to make explicit promises with respect to selling his office in the context of the asylum scenario.

---

[9] Of the 24 public officials for whom FBI HQ approved video-taped meetings, some information regarding prior allegations against eight of them was obtained from FBI files and provided to FBI HQ before meetings were approved.

Present and former officials of the FBI and of other components of the Department of Justice defended the reliance upon middlemen as a safeguard under these circumstances. But the actual events in Abscam raise serious questions about the effectiveness and sufficiency of the purported safeguard.

Former Deputy Assistant Attorney General Nathan, who defended the use of middlemen most strongly, posited four reasons why a middleman would bring to the videotaping room only those public officials who he knew would accept a bribe. First, the middleman could share in a bribe payment only if he produced a corrupt official. Second, the middleman would not want to jeopardize his ongoing criminal relationship with the undercover operatives, because that relationship offered him considerable financial gain. Third, he would not risk being reported to the authorities by an innocent official. Finally, he would not lightly risk the possibility of retribution, including physical harm, by the representatives of the sheiks, for lying to them and subjecting them to the risk of being reported and prosecuted. (Sel. Comm. Hrg., July 29, 1982, at 100-01, 125 (testimony of Irvin B. Nathan).)

The evidence obtained by the Select Committee demonstrates, however, that these purported selfish concerns often failed to operate as safeguards. (*See* Sel. Comm. Hrg., July 22, 1982, at 69-81.) This is hardly surprising as to the first purported concern—that the middleman could share in a bribe payment only if he produced a corrupt public official—, because the middleman had a strong incentive to produce as many public officials as he could, hoping that some percentage of them could be persuaded to accept bribes, whatever their initial inclinations or past records might have been. (*See id.* at 78-79.)

Moreover, the documents show that in January 1980, the final month of Abscam's covert stage, FBI Special Agents Amoroso and Wald made statements that either led or could easily have led middleman Howard Criden to believe that he would receive a payment from Abdul Enterprises merely for producing a public official at the videotaping site.[10] (*Thompson* Gov't Trial Ex. 29A-2, at 3-11;

---

[10] The government contends that this was a pretext to keep Criden "on the string" as the covert operation drew to a close. (*See* Sel. Comm. Hrg., July 27, 1982, at 9-15 (testimony of John Good and Thomas Puccio); Sel. Comm. Hrg., Sept. 30, 1982, at 51-52 (testimony of William H. Webster).) The Select Committee accepts that explanation, especially because contemporaneous documents show that on January 10, 1980, the FBI formally decided to end the covert phase of the investigation on January 31, 1980. ([Deleted]) Nevertheless, pretext or not, statements to Criden that made it likely that he would think he would be paid merely for introducing a public official also made it likely that he would expand his search and involve innocent citizens in embarassing situations.

Thompson Gov't Trial Ex. 30A, at 2-4; *Thompson* Gov't Trial Ex. 33A-3, at 5-8; *Jannotti* Gov't Trial Ex. 2D, at 37-39; *Jannotti* Gov't Trial Ex. 2E-3, at 93-96; *Jannotti* Gov't Trial Ex. 2H, at 83; *Jannotti* Gov't Trial Ex. 2K, at 15-17.) The same documents reflect, however, only one occasion on which Criden was paid without a public official's having received a bribe. That occurred on January 10, 1980, when Criden was paid $5,000 for having delivered Murtha on January 7, 1980. (*See Thompson* Gov't Trial Ex. 29A-2, at 6-10; *Thompson* Gov't Trial Ex. 33A-3, at 5-8.) Criden's testimony on the subject is vague and contradictory. (*Compare Jannotti* Post-trial D.P. Tr. 1.46-47 *with id.* at 1.81-.86 *and* Sel. Comm. Hrg., Sept. 14, 1982, at 112-13 (testimony of Howard L. Criden).) The payments to Criden in January 1980 for producing Johanson, George Schwartz, and Harry Jannotti each followed the public official's acceptance of a bribe. The fact that the operatives provided Criden directly with money for having arranged each of those bribes, instead of requiring Criden to depend on sharing the bribe, simply amounts to a minor increase in the inducement and is in no way troubling. It is unclear whether Criden had believed that he would be paid for bringing these Philadelphia city councilmen to meetings, even if they had not accepted money.

The second purported selfish concern of the middlemen—the fear of jeopardizing an ongoing lucrative criminal relationship—suffers a critical weakness; namely, it cannot work if the middleman in issue has not established the predicated ongoing lucrative criminal relationship. The evidence shows, for example, that when middlemen William Eden and William Rosenberg named Mayor Angelo Errichetti as a politician who would take a bribe, neither Eden nor Rosenberg had received any money from Abdul Enterprises, although they clearly hoped to receive some; and neither Eden nor Rosenberg had produced any other public official for a bribe. Similarly, when middleman Joseph Silvestri stated in October 1979 that New Jersey [deleted] would accept a bribe, Silvestri had not received any money from Abdul Enterprises, had not engaged in any criminal activity for or with Abdul Enterprises, and had not produced any other public official for a bribe (although he had, unbeknownst at that time to the FBI, and apparently himself ignorant at that time of Criden's corrupt purpose in wanting to meet Congressmen, introduced Representative Frank Thompson to Howard Criden). Similarly, middlemen Eugene Ciuzio and Stanley Weisz produced only one public official (Representative Richard Kelly); middleman John Stowe produced only one public official (Representative John Jenrette); middlemen George Katz, Sandy Williams, and Alexander Feinberg produced only one public official (Senator Harrison A. Williams); and, although they hoped to receive money at some point, none of these middlemen had previously received any money from Abdul Enterprises or had engaged in criminal activities for or with Abdul Enterprises.

One weakness in the third purported selfish concern of the middlemen—the fear of being reported and prosecuted by an innocent public official—is that the middlemen knew the slickly garrulous and street-wise nature of Melvin Weinberg. They therefore had to surmise that Weinberg and DeVito (Amoroso) would not be so foolish or naive as to make an unequivocal bribe offer without first softening up and feeling out the person to be bribed; that is, the middlemen knew that it was in Weinberg's and DeVito's interests not to act in a manner that might lead an innocent person to report a bribe offer.

In addition, the middlemen may well have known how difficult it is to prove a bribe, especially where the evidence will be one public official's uncorroborated word against the testimony of all others present at a meeting. (*See* Sel. Comm. Hrg., July 22, 1982, at 78-79.) Even further, as noted by the American Civil Liberties Union in its prepared statement submitted to the Select Committee on September 28, 1982, the middleman

> * * * can tell the politician, as Silvestri told Senator Pressler, that "they told me it was for a campaign contribution," and it is his word against the sheik's as to his involvement in a conspiracy to violate the law. If the politician turns down the offer but does not go to the authorities, he [the middleman] can tell the sheiks that the politician "must have got cold feet." If the politician accepts the bribe, the middleman is home free. (Sel. Comm. Hrg., Sept. 28, 1982 (written statement of the American Civil Liberties Union at 26).)

The fourth purported selfish concern of the middlemen—fear of retribution by the sheiks' representatives—is sound only if the middlemen are warned in advance and are punished when they produce people who do not take bribes. The evidence does not reflect that either of those necessary predicates existed in Abscam. The evidence reflects only one instance in which Weinberg expressly told a middleman not to bring in public officials unless the middleman was sure that the officials would accept bribes in return for explicit promises to assist Abdul Enterprises with official matters. The evidence reflects no instance in which Weinberg even suggested to any middleman that serious consequences would follow the middleman's failure to produce only public officials who would accept bribes. Most important, in the three instances ([deleted], Mario Noto, and Senator Pressler) in which middlemen falsely stated that specified public officials had agreed to accept bribes in return for explicit promises, produced those officials at bribe meetings, and then admitted that the prior statements had been lies, neither Weinberg nor the undercover agents terminated the relationship or threatened the middleman. In only the last of those instances did Weinberg clearly criticize the middleman.

These weaknesses in the safeguard purportedly provided by the middlemen's selfish interests are demonstrated by the conduct of middlemen Errichetti, Criden, and Silvestri. The documents show that none of those men was significantly deterred by the purported selfish interests.

In June of 1979 Errichetti arranged a bribe meeting between the sheiks' representatives and [deleted], New Jersey [deleted]. Before the meeting, Errichetti told Weinberg and DeVito that the public official would accept a bribe and would guarantee a license for check-cashing privileges in specified New Jersey cities. ([Deleted]) After the meeting on June 29, 1979, the Hauppauge Resident Agency reported to FBI HQ that at the meeting "[deleted] failed to offer adequate guarantees and as a result the $50,000 pay-off was not made. During the discussion, Errichetti mentioned that he had not 'briefed' [deleted] beforehand." ([Deleted])

In September 1979 Errichetti arranged a bribe meeting between the sheiks' representatives and a person he said would be Mario Noto, a ranking official in the Immigration and Naturalization Service. When the "official" appeared on September 19, 1979, however, he was not an official at all,[11] but Ellis Cook, one of Howard Criden's law partners. This event shows that both Criden and Errichetti were undeterred by any fear of retribution by the shieks' representatives.

Moreover, their judgment was reinforced by the FBI's reaction to the attempted fraud. Not only did the FBI not terminate the relationship, but on October 2, 1979, Director Webster ordered that no further bribe payments would be approved, except to public officials produced by Criden and Errichetti. ([Deleted]) The evidence shows that, following these events, Criden placed telephone calls to lawyers he knew in distant parts of the country to ask if those lawyers could introduce him to Congressmen in their regions. ([Deleted])

FBI officials have stated that they did not learn, until after Abscam's covert stage had ended, that Criden's law partner had been the actor in the September incident. The files of the Department of Justice contain no contrary information; indeed, they do not reflect that the FBI made any effort to learn who the actor was or what relationship he had to any of the middlemen.

Joseph Silvestri was the most unreliable of the Abscam middlemen: After having boasted of his ability to produce at least four specified mayors, at least two specified Senators, at least eight specified Representatives, and other public officials, he compiled a batting average of .000 for producing public officials who clearly accepted bribes in return for explicit corrupt promises; and he admitted in one meeting that he had failed to tell the public official before the meeting what was to occur at the meeting. The FBI nevertheless claims that Silvestri was reliable because he produced Representative Frank Thompson at the videotaped bribe meeting on October 9, 1979. (Sel. Comm. Hrg., July 21, 1979, at 93 (testimony of Francis M. Mullen, Jr.).) But the FBI's contemporaneous documents show that the FBI believed at the time that Howard Criden had produced Thompson. They also strongly suggest that Silvestri was unaware of the illegal nature of Criden's plan when he introducted Thompson to Criden.

On October 9, 1979, Silvestri suggested that for $25,000 New Jersey [deleted] would accept a bribe. ([Deleted]) At the resulting meeting on October 10, 1979, [deleted] accepted the money, but then promptly sent a letter thanking Silvestri for having provided a legal retainer in connection with the financing of a hotel. Because [deleted] not only did not make the express representations he was supposed to have been told to make, but also he then sent

---

[11] The undercover operatives determined this at the meeting, because they had obtained a photograph of the real Mario Noto and immediately saw the discrepancy between the photograph and the imposter.

Silvestri the letter making receipt of the $25,000 appear legal, the government did not prosecute him and lost $25,000.

On October 19, 1979, Silvestri said that on the next day he would bring in one of three Congressmen. On October 20 he did produce one of them for a meeting with the undercover operatives; but no bribe was offered, because the FBI special agents were unsure of whether the Congressman [deleted] believed that he was there to be offered the bribe or of whether he was prepared to make the requisite promises.

On November 7, 1979, Silvestri was supposed to produce Representatives [deleted] and William J. Hughes to sell their influence. On that day, however, Silvestri called and said that he instead would produce Senator Larry Pressler. As the resulting meeting plainly revealed, Senator Pressler did not know the purpose of the meeting. He had been told by Silvestri only that some people were interested in advancing his political career by making a campaign contribution. He had never met Silvestri until shortly before the meeting on that day.

Despite Silvestri's record of unalloyed unreliability, the FBI authorized the bribe meeting with Senator Pressler within one hour after the call in which Silvestri had said that he was bringing the Senator in for a meeting. Moreover, even after the debacle with Senator Pressler, the FBI, based entirely on Silvestri's statements, began investigating Representative [deleted] and continued that investigation until the very end of the covert stage of Abscam on February 2, 1980.[12]

Another disturbing aspect of the FBI's reliance on the representations of middlemen is that in many instances the FBI made no effort to elicit from the middleman factual representations on which a judgment could reasonably be made as to the accuracy and reliability of the middleman's assertion that the named public official was willing to take a bribe in return for his assistance with immigration or other specified matters.

Thus, for example, when middleman Howard Criden told Weinberg that Representative [deleted] would take a bribe, the dialogue was as follows:

> WEINBERG: Alright. Now you know these guys, right?
> CRIDEN: Yes.
> WEINBERG: You did business with them before?

---

[12] By its own admission, the FBI should have begun reacting to Silvestri's representations much more skeptically after November 7, 1979. Assistant Director Revell told the Select Committee:

"I certainly would say that, if you have had an individual, a corrupt influence peddler, who has twice tried to provide you with an improper situation based upon the understanding he had of what you were interested in, then you would indeed be very circumspect in dealing with him and make sure that there were these safeguards in place to ensure that no innocent third party was in any way implicated in a criminal act which they had no intent to commit." (Sel. Comm. Hrg., July 20, 1982, at 99 (testimony of Oliver B. Revell).) Thus, having been brought Representative [deteted] and Senator Pressler by Silvestri, the FBI had reason by November 7 to "be very circumspect in dealing with him." The record manifests no circumspection in the FBI's pursuit of its investigation of Representative [deleted] on the basis of Silvestri's uncorroborated representations after November 7.

Errichetti had exhausted the two "improper situations" allotted to him even earlier. However, after the [deleted] incident on June 29, 1979, and the Noto debacle on September 19, 1979, the FBI remained willing to use Errichetti, with no detectable loss in enthusiasm. Indeed, on October 2, 1979, Director Webster specifically approved continued reliance on Errichetti. (*See* p. 72 *supra*.)

CRIDEN: Yes.

WEINBERG: So, I mean, uh, they can be trusted?

CRIDEN: Absolutely.

WEINBERG: All right.

CRIDEN: I'm not gonna do it unless I'm, uh, 100 per cent assured of that. (*Thompson* Def. Trial Ex. MD, at 4.)

As this excerpt shows, the only information elicited about Representative [deleted] was that Criden claimed to have done business with him and to trust him. Criden was not even required to represent that [deleted] understood that he was to be offered a bribe, that he would have to make explicit guarantees, and that the guarantees would have to follow the asylum scenario. No such information had been obtained by the time FBI HQ approved a videotaped meeting with Representative [deleted]. FBI interviews conducted after the covert stage of Abscam ended on February 2, 1980, showed that Criden had never met Representative [deleted] and had merely called a lawyer acquaintance in [deleted], who had referred him to a lawyer who had been a partner of the Congressman and who had enabled Criden to talk with the Congressman by telephone. ([Deleted])

Criden was permitted to be similarly vague regarding Representative John Murtha. In a conversation on November 8, 1979, the following dialogue occurred:

CRIDEN: Mel, do you want another guy next week?

WEINBERG: Who you got?

CRIDEN: Congressman John Murtha. This guy is on the appropriations committee, which is a heavy committee. He's on the subcommittee for defense. He handles the money. On top of which, most important of all, he's on the ethics committee.

WEINBERG: Now, we ain't going to have any problem with him?

CRIDEN: No problems. (*Thompson* Gov't Trial Ex. 18A, at 23.)

Even though Special Agent Amoroso, posing as DeVito, was there, no effort was made to determine how well, or even whether, Criden knew Representative Murtha. No effort was made to elicit from Criden an assurance that he had told Murtha exactly what was expected of him or that Murtha had promised to make explicit promises regarding the asylum scenario. No such information had been obtained by the time FBI HQ approved a videotaped meeting with Representative Murtha. Thus, Weinberg's single line, "Now, we ain't going to have any problem with him?" may be contrasted with Supervisor Good's assurance, "we were very explicit to these people [the middlemen] that we wanted them to bring us people that they had done business with before, that they knew were corrupt." (Sel. Comm. Hrg., July 22, 1982, at 59 (testimony of John Good).) By no reasonable interpretation was this safeguard complied with in this instance.

Similarly, on October 17, 1979, Joseph Silvestri first raised the name of Representative [deleted]. The dialogue was as follows:

SILVESTRI: All right. (inaudible) [deleted] or [deleted]

Weinberg: Who's he?

Silvestri: [deleted] is a Congressman from the [deleted] area.

Weinberg: Good enough. *I don't care.*

Silvestri: I'm bringing a real Congressman, incidentally.

Weinberg: Hey, that's what (inaudible).

Silvestri: I can't (inaudible) an old man that looks nice, dress him up, put a pair of glasses (inaudible).

Weinberg: But you know, we, we, we, we plan to make sure to know what the guy looks like (inaudible).

Silvestri: Yeah. ([Deleted] (emphasis added).)

Later in the conversation Silvestri clearly indicated that he had told Representative [deleted] that the meeting was for a payoff of some kind; but no further information was given or elicited that would have enabled the FBI to determine how well, or whether, Silvestri actually knew Representative [deleted]. No attempt was made to elicit from Silvestri a representation that [deleted] knew that he would have to make explicit promises in fulfillment of the asylum scenario. On October 19, 1979, Silvestri told Weinberg that [deleted] would attend a payoff meeting on the following day; the only question Weinberg asked in response was whether the Congressman was related to [deleted]. FBI HQ had no further information when it approved the videotaped meeting with Representative [deleted].

As described above, Weinberg asked Silvestri to arrange a meeting with Representative Hughes after Silvestri had only casually mentioned the Congressman's name. Not only did Weinberg thus target Representative Hughes, but no effort was then made to ensure that Silvestri actually knew the Congressman or to elicit from Silvestri a representation that the Congressman understood that explicit promises regarding immigration assistance would be required. ([Deleted]) Nevertheless, the memorandum presented to Director Webster, on the basis of which he was asked to give and did give his approval for a bribe meeting with Representative Hughes, erroneously stated that Silvestri had represented that Representative Hughes *"will promise* to obtain political asylum or permanent resident status for Yasser Habib, the Arab principal of Abscam." ([Deleted] (emphasis added).)

The most disturbing example of the FBI's failure to make even a minimal effort to obtain factual representations on which to make a judgment about the reliability of a middleman's assertion of a public official's corrupt nature occurred on November 7, 1979. On the previous day, as briefly described above, FBI HQ had approved videotaped meetings with Representatives [deleted] and Hughes for November 7. At 11:25 a.m. on November 7, FBI Supervisory Senior Resident Agent John Good of the Hauppauge Resident Agency called FBI HQ to say that Silvestri had just called to tell the undercover operatives that he would be bringing Senator Larry Pressler, rather than Representative Hughes. (*See* Sel. Comm. Hrg., July 22, 1982, at 42–44 (testimony of John Good).) A memorandum containing that information and requesting approval for the new meeting was provided to Director Webster; the memorandum contained no statement of any factual information indicating the nature of the relationship between Silvestri and Pressler. Moreover, the memorandum, unlike other memoranda in other instances, did not even state that Silvestri had represented that Senator Pressler was corrupt, would take a bribe, would make any promise, or knew the asylum scenario.

Further, at 11:30 a.m. and at 12:30 p.m. Weinberg talked to Silvestri about the impending meeting with the Senator, and in neither instance did Weinberg make any attempt to elicit factual information or to elicit a representation that Senator Pressler knew that he would have to make explicit promises regarding the asylum scenario. ([Deleted]) Thus, the FBI put Senator Pressler before the videotape camera on one hour's notice and with no attempt to determine whether the Senator actually had been told that the meeting was for a corrupt purpose.[13] As everyone has since recognized, he had not been told, and a thoroughly innocent man was tricked into being placed in an embarrassing situation.[14]

When the failures and lies of the middlemen are combined with the virtual absence of factual information provided by them or elicited from them about particular targets, it is apparent that the FBI approved several meetings with public officials without a justifiable basis. In those instances the FBI had neither a reasonable indication that the middleman was generally reliable nor a reasonable indication that the factual statements that had been made in that particular instance were so specific as to suggest that the representations were reliable.

Equally problematical were the memoranda submitted to Director Webster to enable him to decide whether to approve bribe meetings with specified officials. Assistant Director Oliver B. Revell testified before the Select Committee about the information provided to Director Webster in these memoranda:

---

[13] Special Agent Amoroso told the Select Committee that he recalled having talked with Silvestri when Silvestri first called to announce the change in plans and that Silvestri at that time had stated that Senator Pressler would take a bribe. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982; *see* Sel. Comm. Hrg., July 22, 1982, at 41–42, 109 (testimony of John Good).) Unlike the two calls made within the next 70 minutes to Weinberg at the same W Street townhouse, which had the sophisticated electronic monitoring equipment, this call was not recorded, and it was not memorialized.

[14] FBI Executive Assistant Director Mullen has acknowledged that the decision to approve the meeting with Senator Pressler on an hour's notice was "a very difficult call." (Sel. Comm. Hrg., July 21, 1982, at 99 (testimony of Francis M. Mullen, Jr.); *cf.* Sel. Comm. Hrg., July 22, 1982, at 119–20 (testimony of Oliver B. Revell); Sel. Comm. Hrg., July 29, 1982, at 26–27, 77–78 (testimony of John Jacobs).) Mullen and Supervisor Good have observed that Senator Pressler was the first Republican legislator to become involved in Abscam and have indicated that one element of the decision to proceed with the meeting was the feeling that a contrary decision could have appeared, incorrectly, to have been politically motivated. (*See* Sel. Comm. Hrg., July 21, 1982, at 99 (testimony of Francis M. Mullen, Jr.); Sel. Comm. Hrg., July 22, 1982, at 61–62 (testimony of John Good).) Although the dilemma Mullen and Good point to is real, it cannot justify the decision made; rather, it illustrates the importance, as protection to the FBI as well as to the public, of the application, in written contemporaneous documentation, of clearly articulated standards for making sensitive decisions such as whether to schedule a videotaped meeting to offer a public official an opportunity to commit a crime. (*See* Sel. Comm. Hrg., July 29, 1982, at 116–20.)

Supervisor Wilson has suggested in testimony before the Select Committee that he had recommended approval of the meeting with Senator Pressler "because it was already in motion." (Sel. Comm. Hrg., July 22, 1982, at 33 (testimony of Michael D. Wilson).) As Senators McClure and Leahy observed, because middlemen, not the FBI, were able to control this phase of the investigation, the approval mechanism safeguard was fundamentally ineffective. (*See id.* at 33–37.) Former prosecutor Puccio expressed agreement with this conclusion when he told the Select Committee that "there is really not much you can do in an undercover operation to go out and verify these things [incriminatory representations by middlemen]." (Sel. Comm. Hrg., July 27, 1982, at 57 (testimony of Thomas Puccio); *see id.* at 154–56.)

> If we are going to the level [of politician] that would require going to the Director [for approval] then he is going to want to know the same type of information that is called for in the guidelines. He is going to want to know the fact situation as far as how did we get the information, what was the source, what is the credibility of this source, is this an informant, is it someone who came forward to us that we have either corroborated or not corroborated, what additional evidence do we have, what investigation have we done up to that point. He does not get a blank sheet of paper and say, "Authorize a bribe." He has a tremendous amount of information that goes into all of these elements, some of which we will not have totally satisfied at that point. So again, these bribe situations in many instances are going to be contingent authorizations. (Sel. Comm. Hrg., July 20, 1982, at 186 (testimony of Oliver B. Revell).)

Unfortunately, examination of the memoranda submitted to the Director in Abscam reveals Revell's testimony to be far from accurate. The memoranda were both cursory and entirely favorable to going forward. They contained no summary of articulable facts about the middleman's past reliability or unreliability. They contained no summary of articulable facts indicating that the middleman's representations of corruptness in the instance in question were sufficiently detailed to be reliable. They contained no summary of information obtained from a search of FBI files for incriminating evidence relevant to the public official in question. In sum, each memorandum presented to the Director on which to base a decision consisted of a one-sided, incomplete, and often misleading statement, never more than two pages long for any one target.

D. TARGETING OF CONGRESS AS A GROUP—THE ASYLUM SCENARIO

As discussed in subsection B above, descriptive targeting—targeting by describing to a middleman the characteristics of a particular group, rather than by naming the individual members of that group—occurred in Abscam when Weinberg and Amoroso tried to induce middlemen to bring in Republicans and public officials from geographic areas other than the Atlantic seaboard. Descriptive targeting of a broader group occurred even earlier in Abscam, when the undercover operatives concocted the asylum scenario.

The "asylum scenario"[15] was an undercover scenario developed by the Abscam operatives in the summer of 1979. Its principal thrust was that all of the undercover operatives—Weinberg, DeVito (Amoroso), Bradley (Brady), and others—were representatives of a pair of wealthy Arab sheiks from a country with a volatile poltical situation that might explode at any moment. If the explosion should occur, the operatives told middlemen and suspects, the sheiks might want to come to the United States. Finally, the sheiks were said to have wanted to buy assurances of future political help in that regard. (*See generally Myers* Gov't Trial Ex. 5A.)

The initiation of the asylum scenario was a form of descriptive targeting somewhat different from that by which the Abscam operatives descriptively targeted Republicans and public officials from areas other than the Atlantic seaboard. Instead of telling a middleman that they wanted to bribe Congressmen and officials in the Immigration and Naturalization Service, the undercover operatives simply created a scenario that established an apparent need that could be satisfied only by public officials in those two groups. Thus, if the asylum scenario were to produce any results, the results would ineluctably be the involvement of Congressmen and INS personnel. That, of course, is precisely what occurred.

---

[15] The term was in regular use by the FBI by Nov. 1, 1979. ([Deleted])

Because the asylum scenario thus constituted descriptive targeting and shifted the focus of the Abscam investigation, it should have received approval, in advance of its implementation, from FBI HQ. Any such approval should have been based upon articulable facts supporting a reasonable suspicion that a significant number of Congressmen or INS officials had been or were soliciting or receiving bribes in return for promises of assistance in immigration, naturalization, residency, and citizenship matters.[16] No such approval was sought or granted, and no such articulable facts ever were stated in any document in the FBI or elsewhere in the Department of Justice.

Indeed, the very origin of the asylum scenario is unclear. The first document sent to FBI HQ referring to the asylum scenario was sent on August 14, 1979. ([Deleted]) Neither that document nor any other sent to FBI HQ before a bribe was offered to a Congressman described the manner in which the asylum scenario had been created, identified who had created it, or explained how it was being developed and implemented.

An earlier document, dated July 30, 1979, described discussions that had occurred on the FBI's Abscam yacht, *The Left Hand,* on July 26, 1979, including Special Agent Anthony Amoroso's mention of the sheiks' concern about having to flee to the United States and Mayor Errichetti's statement that he had political connections who could help. ([Deleted]) That document does not appear to have been sent to FBI HQ. Moreover, it does not state whether Amoroso had discussed such a scenario with his supervisor, John Good, or with the informant, Melvin Weinberg, or with any other person before July 26, 1979. In short, it does not state, expressly or implicitly, that the asylum scenario spontaneously arose on July 26, 1979.[17]

---

[16] There must, of course, be a match between the reasonable suspicion of criminal activity and the group of individuals that is targeted by the operation. Thus, it would be unreasonable on the basis of a reasonable suspicion that public officials in the Department of Agriculture and on Congressional committees related to agricultural matters were accepting bribes, to initiate a scenario that would involve only public officials in the Department of Labor or on Congressional committees related to labor matters.

[17] Testimony on the origins of the July 26, 1979, use of the asylum scenario has been confused. Amoroso first testified that he had decided to use the asylum scenario on July 25, 1979, after having read an article in that day's *Miami Herald* about deposed Nicaraguan leader Anastasio Somoza. Amoroso testified that he had telephoned Good on July 25 and had obtained approval to use the scenario the next day. (*See Jannotti* Pre-trial D.P. Tr. 5.148-.159.) Subsequently, Amoroso testified that he had erred in that statement and that he believed that he had thought of the scenario extemporaneously on the yacht on July 26 and had discussed it with Good only after he had explained it to Criden and Errichetti. (*See Myers* D.P. Tr. 4038-39.) This explanation matched Good's original testimony that he had understood Amoroso to have implemented the scenario on the "spur of the moment." (*Jannotti* Pre-trial D.P. Tr. 3.188.) Good told the Select Committee that he had not learned of or approved the use of the asylum scenario until after its use on July 26. (*See* Sel. Comm. Hrg., July 22, 1982, at 86-92, 123-25 (testimony of John Good).) Puccio originally told the Select Committee that he believed that he had discussed the

Continued

There is substantial evidence that the asylum scenario was developed earlier. On July 14, 1979, in a conversation with middleman George Katz, Weinberg raised and discussed the possibility that the sheiks might have to flee their country. He also described the sheiks' concern that they might have difficulty getting into the United States. Katz replied by stating that the sheiks would need many friends in Congress. Weinberg then told Katz that the sheiks were in fact looking for every political friend they could get and that they already had an appointment with a Congressman on August 6, 1979.[18]

Thus, there is some evidence that the asylum scenario, or at least the plan to investigate Congressional corruption, began on or about July 26, 1979. There is more substantial evidence that it began on July 14, 1979. In addition, there is a small amount of evidence that the interest in investigating members of Congress began even earlier. On October 17 or 18, 1978, middleman John Stowe told Weinberg that Stowe had a Congressman friend who was "as big a crook as" Stowe and who would help get certificates of deposit into the United States from Switzerland. Telephone toll records of the FBI show that between that date and April 18, 1979, Weinberg had at least 16 unrecorded conversations with Stowe. On April

---

scenario with Amoroso shortly before July 26; but, after Good, who was present at the interview, protested, Puccio indicated that he could not recall whether he had been informed before or after July 26. (Sel. Comm. interview of Thomas Puccio and John Good, July 13, 1982.) When he testified before the Select Committee, Puccio indicated that it had probably been within a few days after July 26 when he had heard of the asylum scenario. (Sel. Comm. Hrg., July 27, 1982, at 89, 169–70 (testimony of Thomas Puccio).)

Further Weinberg first testified that the asylum scenario had been created on the yacht on July 26, but by Criden, not by Amoroso. (*See Jannotti* Pre-trial D.P. Tr. 3.86–.87.) Some evidence suggests that Weinberg had also told this version of the origins of the scenario to government attorneys and agents during the covert stage of the investigation. (*See, e.g.*, [Deleted]; *Myers* D.P. Tr. 2268–81; Sel. Comm. Hrg., July 28, 1982, at 17 (testimony of Edward J. Plaza).) Weinberg has since testified consistently that Amoroso invented the scenario spontaneously, as far as Weinberg knew, on July 26. (*See, e.g., Jannotti* Pre-trial D.P. Tr. 3.144, 7.77–.78; *Myers* Trial Tr. 1893–95, 2169–71; *Thompson* Trial Tr. 1414–17, 1493–94; *Lederer* Trial Tr. 737–43; Sel. Comm. Hrg., Sept. 16, 1982, at 133, 139–41 (testimony of Melvin C. Weinberg).)

[18] That appointment, which had been scheduled with Representative Jenrette on July 11, 1979, through middleman John Stowe, was canceled some time before August 6, 1979. There is no document seeking FBI HQ approval for the meeting, describing the purpose of the meeting, or describing what scenario was to be used.

The relationship between the July 14 conversation between Weinberg and Katz and the use of the asylum scenario by Amoroso on July 26 has been the subject of extensive conflicting testimony. Amoroso first testified that, based on his standard procedures, he believed that he had discussed with Weinberg, and probably had listened to, the July 14 tape within a few days after it had been recorded. (*See Myers* D.P. Tr. 4045–47, 4072–75.) Amoroso added that he believed he had been with Weinberg on July 18 or July 19. (*See id.* at 4045.) After Amoroso had been shown evidence that Weinberg had not even delivered the July 14 tape until August 6, 11 days after the conversation on the yacht, Amoroso maintained that he had, on July 26, been aware of the July 14 conversation. (*See id.* at 4107–10.) Amoroso stated, "I can't say what Mr. Weinberg said in his conversation with Mr. Katz didn't have some bearing in my mind at the time that I suggested it on the 26th." (*Id.* at 4109.) Before the Select Committee Amoroso suggested that Weinberg's conversation with Katz and Abdul Enterprises' immigration dealings with Alexandro had probably been in his mind, but the catalyst for his proposal on the yacht on July 26 had been only the newspaper article. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) Weinberg testified before the Select Committee that his July 14 conversation had been spontaneous and that he had not been intending to introduce the subject of congressmen. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 136–39 (testimony of Melvin C. Weinberg).) Weinberg could not recall whether he had discussed this conversation with Amoroso between July 14 and July 26. (*See id.* at 139–40.) FBI officials and prosecutors have maintained that the July 14 conversation was not an element in the development by Amoroso of the asylum scenario, but either was a sheer coincidence, was initiated by Katz, not Weinberg, or only appears to have been a discussion about bribing congressmen to provide immigration assistance. (*See, e.g.*, Sel. Comm. Hrg., July 21, 1982, at 47–52 (testimony of Francis M. Mullen, Jr.); Sel. Comm. Hrg., July 22, 1982, at 93–94 (testimony of John Good); Sel. Comm. Hrg., July 27, 1982, at 88–89 (testimony of Thomas Puccio).)

18, 1979, Stowe told Weinberg that Representative Jenrette was the friend to whom he, Stowe, had referred earlier. ([Deleted]) On April 19, 1979, the FBI's Miami Field Office requested a background search on Representative Jenrette. ([Deleted])

Another early instance in which Congressmen were mentioned occurred on March 30, 1979. On that date Weinberg had a lengthy meeting with Errichetti, and their conversation was neither recorded nor later memorialized in any FBI document. On that same date, Errichetti gave Weinberg a handwritten list of politicians who Errichetti said would sell their offices; that list included two Congressmen, one of whom was Representative Michael "Ozzie" Myers. ([Deleted]) Puccio told the Select Committee that nothing resulted from Errichetti's provision of a list of purportedly corrupt politicians because in March, unlike in July, "there was nothing to do with just a mention of a name." (Sel. Comm. Hrg., July 27, 1982, at 111 (testimony of Thomas Puccio).)

The broadest type of descriptive targeting that occurred in Abscam took the form of requests by Weinberg for middlemen to involve corrupt politicians in the various Abdul Enterprises transactions. As with the asylum scenario, it is unclear when and how this descriptive targeting commenced, but it is clear that FBI HQ was not asked in advance to approve this form of targeting, which had not been included in the original application for approval on May 26, 1978.

The first document telling FBI HQ that bribery of politicians had arisen as a possible avenue of investigation was sent on December 21, 1978. On January 11, 1979, the FBI's Brooklyn-Queens Field Office told FBI HQ that Abscam was "targeted against high level political corruptors," and requested permission to offer Mayor Angelo Errichetti a $25,000 bribe. On February 9, 1979, the same office told FBI HQ that Abscam was "a major political corruption case involving the obtaining of a gambling license." None of these documents described how the shift to a focus on political corruption had occurred, who had conceived of or approved the shift, what was being done to corroborate middlemen's statements that particular politicians were corrupt, or how the political corruption investigation was to be implemented.

Because of the absence of any such description, the FBI files are ambiguous as to when and how the shift to a political corruption investigation began. FBI witnesses have stated that the shift occurred on November 16, 1978, when middlemen William Rosenberg and William Eden told Weinberg that Mayor Angelo Errichetti was corrupt and would engage in corrupt transactions with Abdul Enterprises. *(See, e.g.,* Sel. Comm. Hrg., July 21, 1982, at 10 (testimony of Francis M. Mullen, Jr.).) On the other hand, there is evidence that the shift occurred earlier and did not arise from any statement by Rosenberg. On October 2, 1980, at the Abscam trial of Representative John Jenrette, FBI Agent Gunnar Askeland, an agent in the FBI's Miami Field Office, testified that in May 1978 a cooperating citizen named Joseph Meltzer provided information about a local politician in West Palm Beach, Florida, and that, as a result, Askeland opened an undercover operation in August 1978 to investigate that politician and organized crime people. The operation, called "Palmscam," lasted until early October 1978.

During the same period, Agent Askeland also worked as an Abscam undercover agent in Florida. In that role, he was Melvin Weinberg's contact agent in Florida, which involved attending meetings with Weinberg, processing leads, and handling administrative needs. Askeland testified that, in his capacity as an Abscam agent, in late October 1978 he instructed Weinberg that the FBI was no longer interested in pursuing any investigation of illegal securities and that "the new targets were going to be . . . deals with Las Vegas and Atlantic City and political corruption." (*Jenrette* Trial Tr. 4172.)

Thus, if Agent Askeland's testimony is correct, it shows that Abscam was used as early as July 1978, at least in a peripheral way, to assist an investigation of corrupt politicians and that by late October 1978 Weinberg had been instructed that Abscam's central focus had turned to political corruption. If Askeland was correct, the documents show a two-month lag between the time when the operation's focus turned to political corruption and the date when FBI HQ was told of the shift.

The FBI Abscam files support Agent Askeland's testimony, but not conclusively so. The documents show that on September 13, 1978, in a conversation with a businessman named Herman Weiss, Weinberg raised the matter of corrupt politicians. In particular, Weinberg told Weiss that the sheik would not agree to allow any other person to hold an ownership interest in an Abdul Enterprises venture unless that person were a politician who had to be bribed.

In addition, on October 6, 1978, in a conversation with businessmen William Rosenberg and Dan Minsky, Weinberg again raised the issue of corrupt politicians. On this occasion he did so expressly in the context of a discussion of gambling in Atlantic City, New Jersey, and indicated that Abdul Enterprises would provide financial support to Minsky and Rosenberg in Atlantic City if they could show him that they had "the juice." It was Rosenberg and partner William Eden who, on November 16, 1978, told Weinberg that Abscam defendant Angelo Errichetti, the Mayor of Camden, New Jersey, was corrupt and who then arranged for Errichetti's introduction to an undercover agent.

Weinberg's broaching of the political corruption issue on those two occasions may have occurred pursuant to the instructions Agent Askeland described; but, in public testimony by FBI officials, it has been suggested that the introduction of the subject of public officials by Weinberg on September 13 and October 6, 1978, was simply his spontaneous elaboration of the original scenario. (Sel. Comm. Hrg., July 21, 1982, at 33-35 (testimony of Francis M. Mullen, Jr.).)

Supervisor Good testified before the Select Committee that the September 13, 1978, and October 6, 1978, conversations had not been under his supervision.

> Q: All right. Now go ahead and explain the 9/13 and the 10/6 conversations.
>
> A: During the early stages of Abscam, Mel Weinberg was involved in not only the Abscam operation emanating out of New York but also what we term the Goldcon operation, which was run by the Miami office. In his conversa-

> tions with Weiss and others down there, he was not under my immediate direction during the time he was there. He was being operated down there by agents who were working on the Miami squad and involved in Goldcon. I do not know of my own knowledge specifically what the direction of their case is. I suspect that they were into the political areas down there prior to what we got involved in. And he was dealing on a different basis down there than he was up in New York. That was when he was discussing the politicians with Herman Weiss. I did not become aware of that until much later on, probably after the covert stages ended that he had had these conversations even. (Sel. Comm. Hrg., July 22, 1982, at 97–98 (testimony of John Good).)

Good's explanation is seriously inaccurate. However the September 13 and October 6 conversations occurred, it is clear that they were either a part of, or inextricably interwoven with, Abscam. The September 13 meeting occurred at Abdul Enterprises' business office in New York, not in Florida, where Goldcon was being operated. Further, the meeting was attended by Jack McCloud (Special Agent John McCarthy), who was an Abscam undercover agent under Good's direct supervision. Neither Special Agent Gunnar Askeland nor any other Goldcon special agent was present. The October 6 meeting was also at Abdul Enterprises' offices in New York, and was also attended by McCloud and not by anyone connected with Goldcon. Moreover, that meeting involved Dan Minsky and William Rosenberg, both of whom were Abscam suspects. Finally, the application for authorization of Goldcon, which was written on October 18, 1978, listed numerous meetings in the fall of 1978, but included neither of these meetings. The list of Goldcon accomplishments did not mention either Rosenberg or Minsky. (*See* attachment to Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 4, 1982).)

Puccio, on the other hand, testified that the September 13 conversation did not seem to him "to be any serious attempt to bring the whole operation into the political corruption area." (Sel. Comm. Hrg., July 27, 1982, at 82 (testimony of Thomas Puccio).) He said that he had been unaware of the September 13 and October 6 conversations, which would not have constituted a change in direction "until you have a number of cases going that way." (*Id.* at 81.) Puccio erroneously stated that the FBI had been aware of the conversations. (*Id.* at 83–84.)

Moreover, the FBI takes the tautological position that a shift in the direction of an investigation, such as toward public corruption in Abscam, occurs not when the field operatives have successfully initiated a new scenario that has different investigative implications, but only after FBI HQ has been informed of and has approved such a shift. Thus, when Executive Assistant Director Mullen was shown the September 13 and October 6 conversations, he testified as follows before the Select Committee:

> Now, it could have been many conversations along this line. What we are referring to when we say it changed direction was when officially, FBI Headquarters was aware

> that we were into this area, and at that point the investigation turned direction. You could not pick out any one conversation and say it was based on that particular conversation. (Sel. Comm. Hrg., July 21, 1982, at 33 (testimony of Francis M. Mullen, Jr.).)

This interpretation, of course, eliminates by definition the possibility of an undercover investigation's changing direction in the field without reasonable justification or approval from FBI officials in Washington. In short, the record is unclear as to why and on whose authority the focus of Abscam changed from an undercover operation aimed at property crimes to one directed to political corruption.

II. FAILURES OF EVIDENCE MANAGEMENT

A. Consensual Recording of Conversations with Suspects

In testimony before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Philip B. Heymann, who had been the Assistant Attorney General in charge of the Criminal Division during the Abscam operation, emphasized the critical role that proper management of tape recordings can play in an undercover operation:

> Three problems dominate the extensive use of consensual recordings in complex undercover operations: [1] the establishment of a clear and workable policy regarding the circumstances under which calls or meetings should be recorded and who, if anyone, should exercise discretion; [2] the development of a system of custody and control for tapes that will ensure that they are preserved without exception and promptly gathered, logged, and indexed at a central location; and finally, [3] the initiation of a systematic policy for the prompt review of all recordings. It is difficult to overestimate the importance of all three of these elements to the overall quality and efficiency of an investigation.
>
> Without a consistent taping policy, any operation will be challenged by defendants who will invariably maintain that exculpatory meetings were left unrecorded and that recorded sessions were manipulated. The absence of clear guidelines for the custody and control of recordings will frustrate any efforts at the systematic review of recordings and raise troubling evidentiary questions at trial. The failure to provide for contemporaneous review of recorded meetings or conversations prevents supervising officials from exercising close scrutiny over the conduct of the informant, obstructs any efforts to review the status of the investigation and to evaluate allegations against particular individuals, and prevents agents and attorneys from exploiting information developed during meetings. (House Jud. Subcomm. Hrg., June 3, 1982 (written statement of Philip B. Heymann at 29-30).)

The FBI failed in Abscam to implement in an effective manner any of the three elements articulated by Professor Heymann—recording policy; preservation, logging, and indexing; and prompt transcription and review. As a result, the government experienced every one of the costly consequences described by him. Indeed, virtually every serious problem in the Abscam investigation and prosecutions either arose from or was exacerbated by the FBI's unjustifiable carelessness in the gathering, management, and control of recorded evidence.

1. Failures to record and to memorialize conversations.

Weinberg and undercover special agents engaged in numerous unrecorded telephone conversations and meetings with suspects of the Abscam investigation. Many of these conversions occurred at critical times and appear to have not been not only material, but highly significant. From the number of unrecorded conversations and from the extrinsic evidence of the probable substance of many of them, the Select Committee has concluded that Weinberg deliberately ensured that particular conversations would not be recorded or otherwise preserved. Although the FBI field agents at all times during the investigation could have obtained and examined Weinberg's telephone toll records and thereby could have learned of his failure to record numerous key conversations, there is no evidence in FBI files or elsewhere of any attempt to do so until after the end of the covert stage in February 1980. As a result, the FBI remained unaware, throughout the covert phase of the operation, of Weinberg's clandestine meetings and surreptitious contacts with suspects.[19]

(a) The number and nature of unrecorded calls

It is impossible to determine how many unrecorded conversations with suspects Weinberg conducted in the two years from February 1978 to February 1980 that he functioned as an undercover operative in Abscam. That number can be estimated, however, by comparing the telephone toll records for Weinberg's homes and credit card and for the Abdul Enterprises' business telephones with the audio tapes generated in those two years. The figure usually cited for the number of Abscam audio and video tapes recorded is 1,000. Although some of those tapes contain more than one conversation, the vast majority do not. Also, although Weinberg did not participate in some of the taped conversations, the great majority are audio tapes of telephone conversations between Weinberg and a suspect. Thus, the number of recorded telephone conversations involving Weinberg is approximately 1,000.

It is more difficult to estimate the total number of Weinberg's Abscam-related telephone calls, both recorded and unrecorded. Telephone toll records provided to the Select Committee reflect that Weinberg and undercover agents completed approximately 5,000 long-distance and message-unit toll telephone calls charged to

---

[19] Former prosecutor Thomas Puccio suggested to the Select Committee that, in retrospect, it would have been wiser to have arranged monthly meetings between the case prosecutor and the case agent to review Weinberg's telephone toll records. (Sel. Comm. interview of Thomas Puccio, July 13, 1982.) The Select Committee agrees.

Weinberg's homes, to Abdul Enterprises' offices, and to Abdul Enterprises' credit card. The vast majority of these appear to have been placed by Weinberg; some, perhaps half, of them appear to have been his personal, non-Abscam calls. Telephone toll records reflect, moreover, that over 400 calls were completed to the telephones of four suspects (Angelo Errichetti, Alexander Feinberg, George Katz, and Henry A. "Sandy" Williams, III), and Weinberg conversed with more than 60 suspects during the Abscam operation. From these facts it may be estimated that Weinberg, in his capacity as an Abscam informant, placed more than 2,000 Abscam calls to suspects. The Select Committee's analysis of a sample of the records of those calls suggests that fewer than one-quarter of them may have been calls that, by virtue of their each having been of less than one minute's duration, may be presumed to have been calls in which the person Weinberg was calling was unavailable.

It thus appears likely that Weinberg initiated more than 1,500 substantive Abscam-related calls from telephones for which the FBI obtained records. He undoubtedly received hundreds, and probably thousands, of other substantive calls from Abscam suspects,[20] but telephone toll records do not reflect incoming calls. Additionally, Weinberg completed an untold number of untraceable local calls and toll calls that he neither charged to an Abdul Enterprises number or credit card nor placed from one of his residences.

The Select Committee estimates, therefore, that Weinberg participated in considerably more than 2,000 substantive telephone conversations with Abscam suspects. Of those, he recorded approximately 1,000. In the undercover operation described by the FBI as the most closely supervised investigation in FBI history,[21] the government's chief informant appears likely to have recorded fewer than one-half of his substantive telephone calls with suspects.

Many of these unrecorded conversations have been proved by extrinsic evidence to have contained highly significant exchanges between Weinberg and suspects. A review of existing tape recordings reveals references, in almost all segments of the two-year operation, to other conversations and to meetings for which there are no recordings. A comparison of the telephone toll records with the tape recordings for the days just before and just after critical events over the course of the operation reveals salient unrecorded conversations. Many of these conversations have been the subject of extensive controversy and conflicting testimony. Some of these important unrecorded conversations are discussed elsewhere in this report. Ten examples are summarized below:

(1) Only five Abscam conversations were recorded in the period before September 1978. From July 25, 1978, when FBI HQ notified the New York Field Office that Abscam had been approved as an undercover operation, until the end of that year, 45 recording tapes were produced; approximately 20 of those tapes included more than one conversation. Telephone toll records obtained by the FBI many months later show 12 unrecorded conversations between middle-

---

[20] *Cf.* [Deleted]. (The omission of a citation to a confidential document is identified by "[Deleted]." *See* pp. V–VI *supra*.)

[21] *See, e.g.*, Sel. Comm. Hrg., July 21, 1982, at 25, 27-28 (testimony of Francis M. Mullen, Jr.); *Washington Star*, Feb. 13, 1980, at A10 (*quoting* FBI Director William H. Webster.)

man John R. Stowe and Weinberg in November and December and numerous unrecorded conversations between Weinberg and other suspects during the same period. Three of the unrecorded Stowe calls and numerous unrecorded conversations with other suspects were made to or from the FBI's Abdul Enterprises offices. The toll records show four additional unrecorded conversations between Stowe and Weinberg from January to April of 1979. (*See Jenrette* Gov't Trial Ex. 41.) No explanation has been given as to why calls made to and from the FBI's own business front were not recorded. The explanation that the conversations with Stowe were "unimportant" is unacceptable. (*Jenrette* Trial Tr. at 1609–14.)

(2) The Select Committee has learned from FBI documents that the January 9, 1979, meeting with Errichetti and McCloud was first scheduled for December 8, 1978, rescheduled for December 21, 1978, and not actually held until January 9, 1979. Because the meeting was being scheduled through middlemen William Eden and William Rosenberg, and because the meeting was rescheduled at least twice, several telephone calls must have been needed to arrange and to cancel each of the scheduled meetings; but there is no recording of any one of those calls, and the telephone toll records show that Weinberg had numerous unrecorded telephone conversations with Eden and Rosenberg between December 1, 1978, and January 9, 1979.

(3) Telephone toll records also reflect that Weinberg participated in at least two unrecorded telephone conversations with Errichetti on January 17, 1979. On that same day Errichetti discussed with McCloud (Special Agent McCarthy) the $25,000 payment to be made to Errichetti by McCloud on January 20. It is impossible to learn the substance of the Errichetti-Weinberg calls, but they presumably related to the payoff.

(4) Similarly, toll records show calls from Weinberg to Errichetti during the last ten days of January. Although those calls may have discussed Errichetti's receipt of the January 20 bribe and subsequent plans to counterfeit securities,[22] the calls were not recorded.

(5) Sometime in January 1979, Weinberg met Alfred Carpentier. The meeting was not recorded. Later in that month Carpentier gave Weinberg fraudulent securities. That meeting also was not recorded. There is no recording of any conversation between Weinberg and Carpentier arranging either of the meetings or discussing their securities project.

(6) In February 1979 Weinberg met with Edward Ellis, who was seeking financing for a construction project. Weinberg apparently told Ellis that, in order to receive a loan from Abdul Enterprises, Ellis would have to be able to guarantee that politicians would assist the project. Neither the meeting nor numerous conversations between Weinberg and Ellis and between Weinberg and Errichetti, who had put Ellis in contact with Weinberg originally, were recorded.[23] Weinberg testified that in March 1979 he had been talking to Errichetti approximately daily. (*See* Sel. Comm. Hrg., Sept. 16, 1979, at 177–78 (testimony of Melvin C. Weinberg).)[24] Recordings

---

[22] In the last 10 days of January, Weinberg told FBI special agents about some portions of conversations he claimed to have had with Errichetti about these matters.

[23] Three conversations with Ellis between February 1 and March 31 were recorded.

[24] *See also* [Deleted]

exist for only eight conversations or meetings between Weinberg and Errichetti in all of March 1979.

(7) On July 26, 1979, the day on which the asylum scenario was elaborated to Errichetti and Criden, Weinberg initiated, but did not record, a six-minute conversation with Errichetti. (*See Myers* Trial Tr. 1591.)

(8) Weinberg's receipt of three expensive wrist watches from George Katz in late June 1979 became the subject of extensive testimony in court proceedings. Defendants, including Katz before his death, have alleged that Weinberg solicited the watches, while Weinberg has claimed that Katz volunteered the watches as gifts. The conversation in which Weinberg and Katz first discussed the watches was not recorded. The meeting in which Katz gave Weinberg the watches was unrecorded. The conversation in which that meeting was arranged was unrecorded.

(9) On September 10, 1979, William Rosenberg met with Weinberg and Bradley (Special Agent Brady) at the JFK Hilton. Weinberg asked Rosenberg, referring to a previous unrecorded conversation, whether Rosenberg had "reached out for them," but did not identify "them." Rosenberg, apparently understanding the reference clearly, responded with the first mention of Senator [deleted][25] or Senator [deleted] on any Abscam tape. (*See Kelly* Gov't Trial Ex. 5-C.) Allegations have been made that Weinberg targeted those politicians for investigation by requesting that Rosenberg approach them with corrupt offers. Because whatever conversation or conversations Weinberg and Rosenberg had on the subject of Senators [deleted] and [deleted] before September 10, 1979, were not recorded, it is impossible to determine how and by whom their names were raised.

(10) On November 7, 1979, Joseph Silvestri took Senator Larry Pressler to a meeting with the undercover operatives in Washington, D.C. The FBI has acknowledged that Senator Pressler was substituted for another individual on roughly one hour's notice, when Silvestri telephoned DeVito and reported that the other politician was not available, but that Senator Pressler was. The Select Committee took extensive testimony on the substance of that telephone call and on the extent to which the substance of the call was communicated to the Strike Force attorneys and the FBI officials who approved the impending meeting with Senator Pressler. Although that call was received by Special Agent Amoroso at an Abdul Enterprises front, the W Street townhouse, the telephone call was not recorded. The only justification offered for that failure was Amoroso's explanation that, because the operatives had been expecting Silvestri to arrive at the townhouse with the other politician, they had not been anticipating any important telephone calls. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) The W Street townhouse was the site of critical payoff meetings throughout the course of the operation and was extensively wired for recordings. The apparent failure to maintain and to activate recording equipment on telephones used to receive outside calls on telephone numbers given to suspects is inexcusable.

---

[25] The omission of sensitive information is identified by "[deleted]." *See* pp. V–VI *supra.*

(b) Recording instructions and equipment given to Weinberg

The explanation for the foregoing problems and for many other unrecorded conversations may lie in part in the nature of the instructions and equipment given to Weinberg. Special Agent Askeland testified that in 1978 Weinberg was under instructions from the FBI to record all conversations regarding illegal activities. Askeland also testified that he had expressly told Weinberg not to record conversations about personal matters or about legitimate activities. (*See Jenrette* Trial Tr. 4114–17, 4170–72.) Askeland believed that, because Weinberg had spent many years "on the street," Weinberg knew what was legitimate and what was illegitimate. (*Id.* at 4173–76A.)

Weinberg has testified that in 1978 he had been using only his own tape recorder, which he continued to use throughout the investigation, and that the FBI did not supply any tape recorder until approximately March 1979. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 158–59 (testimony of Melvin C. Weinberg); *Myers* Trial Tr. 1602–03; *Wms.* Trial Tr. 1296–97.) Further, he testified that it had been very difficult to obtain blank tape cassettes from the FBI and that, when he had been "on the road," he frequently had run out of the tapes he had been given in New York. He also claimed that he had been unable to obtain tapes from the West Palm Beach Resident Agency, because "[t]hey didn't have tapes." (Sel. Comm. Hrg., Sept. 16, 1982, at 159–60 (testimony of Melvin C. Weinberg).) Regarding the taping of telephone conversations in 1978 at the Abdul Enterprises office in Holbrook, New York, Weinberg testified,

> *We didn't have a set-up in Abdul in at the time.* . . . [I]n order to tape a telephone call in Abdul headquarters, you had to take a tape recorder and stick it on the machine, like we did. The only recorder was in [Special Agent] McCarthy's office, and it was locked up sometimes; and we had a problem with tapes. So, sometimes I would bring mine in that I had to tape something, but *most of the time we didn't tape too many calls unless Jack [McCarthy] taped them* in the beginning. (*Id.* at 161–62 (emphasis added); *see Jenrette* D.P. Tr. 1093–94.)

Weinberg testified before the Select Committee that he had been instructed "[t]o tape wherever it was possible." (Sel. Comm. Hrg., Sept. 16, 1982, at 159 (testimony of Melvin C. Weinberg).) He also has testified, inconsistently, that the FBI told him to tape only "what was important" and has claimed that he preferred, if he could, to tape a call, rather than to decide what was important. (*See id.* at 163–64; *Wms.* Trial Tr. 1325–26.) He also has testified, again rather inconsistently, that he deliberately did not tape conversations that he thought would be unimportant. (*See Jenrette* Trial Tr. 1451, 1611.) He further has testified that, when Amoroso joined the investigation, Amoroso instructed him to tape every conversation with a suspect and to tape only one conversation on each cassette. (*See* Sel. Comm. Hrg., Sept. 16, 1979, at 166 (testimony of Melvin C. Weinberg); *Jenrette* Trial Tr. 1318–19; *Jenrette* D.P. Tr. 1070–71, 1094.) Amoroso confirmed these instructions. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.)

Weinberg's explanations for his many failures to record telephone calls are numerous, varied, and in many respects unpersuasive. He has testified that he did not tape a call if it seemed unimportant (*see, e.g., Jenrette* Trial Tr. 1451, 1611); if he did not have enough tapes (*see, e.g., id.* at 1450–51, 1610–11); if he did not have recording equipment (*see, e.g., Alexandro* Trial Tr. 444–46; *Myers* Trial Tr. 2242–44, 2248–49); if someone was present (*see, e.g., Kelly* Trial Tr. 3792, 3802–05; *Myers* Trial Tr. 2242); if someone walked in during the call (*see, e.g., Kelly* Trial Tr. 3793–94, 3801); if he was calling from a pay telephone (*see, e.g., id.* at 3799; *Myers* Trial Tr. 2242); if he could be seen (*see, e.g., Jenrette* Trial Tr. 2013–15); if he had with him only equipment he did not know how to use (*see, e.g., Jenrette* Trial Tr. 2083–85); or if his equipment could not be attached to his telephone (*see, e.g., Kelly* Trial Tr. 3794–95).

Weinberg also attempted to justify his failure to record many calls from his Florida trailer by stating that he had had two telephones in that trailer; one, he said, had been a designer Mickey Mouse telephone attached to a personal, non-Abscam line and had been unable to be fitted with recording equipment. (*See id.* at 3794–95.) The other telephone, he testified, had been installed by the FBI, purely for Abscam undercover work, on an outdoor screened porch from which he could be seen by numerous individuals, many of whom had walked in and out of the porch at their leisure. (*See id.* at 3793–94; *Jenrette* Trial Tr. 2013–15.)

In evaluating Weinberg's explanations it is worth emphasizing that Weinberg was serving a three-year sentence of probation during the Abscam investigation. He could have been, and probably would have been, in prison had it not been for the FBI's intercession on his behalf during the sentencing process in December 1977. It hardly would have been an arduous condition for the FBI or Department of Justice to have required Weinberg to forgo the use of his designer telephone in his second home, located 1,500 miles from the FBI Resident Agency and prosecutors with principal Abscam responsibility. Similarly, if the undercover operatives did in fact make the initial glaring error of putting Weinberg's only Abscam Florida telephone in a place open to public view, hearing, and access, that error should have been rectified immediately upon Weinberg's having told the agents of the problem. It is more likely that Weinberg concocted his patently weak explanations for his failures to record and that these explanations bear no relationship to the facts.

Amoroso told the Select Committee that he believed that most unrecorded telephone calls from Weinberg to Errichetti's office had lasted only one or two minutes and probably had been received only by Errichetti's secretary or switchboard, not by Errichetti himself. Amoroso also maintained that Abscam used too many locations to enable the FBI to provide equipment on each telephone. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) Amoroso's first excuse ignored the great number of lengthy unrecorded conversations. His second excuse ignored the existence of many unrecorded telephone calls Weinberg placed from his residences and from Abdul Enterprises' business locations, which could have and should have been outfitted with adequate recording equipment. Amoroso also did not explain the apparent failure of the FBI to obtain telephone tolls records during the covert stage of the operation in order to determine whether Weinberg had been violating his instructions regarding the tape recording of telephone conversations.[26]

(c) Gaps in tape recordings

Numerous tapes recorded by Weinberg in Abscam failed to capture the entire conversation with a suspect. The majority of such tapes omit only the beginning of the conversation. Weinberg testified that, with the exception of one telephone call on April 1, 1979 (*see* pages 143–46 *infra*), he never started the tape recorder until the intended recipient of the call was on the line. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 96, 115 (testimony of Melvin C. Weinberg). In particular, Weinberg testified that the reason for his numerous failures to record the opening portions of conversations was his attempt to avoid wasting tape on conversations with receptionists and secretaries:

> Q: [Y]ou said . . . that you never turned the recorder on until you got the person you wanted to talk to [except for the call on April 1, 1979]?
>
> A: That's what I always did except for this call [on April 1, 1979] . . . . Whenever I spoke to someone, I put the tape on then.
>
> Q: When you got the person you wanted?
>
> A: As soon as the person—because a lot of times you would call the Mayor in his office, right, you had to go through two girls, and then they say he's not there, and we wasted a tape. We didn't have that many tapes.
>
> Q: So you waited until you got the Mayor?
>
> A: I waited until I got him, and then I put it on. (*Id.* at 115–16; *see Jannotti* Pre-trial D.P. Tr. 7.27; *Myers* Trial Tr. 1605–09, 1637–38, 2265.)

Weinberg's explanation is belied, however, by the existence of numerous tapes in which he recorded greetings and similar prefatory conversation with Errichetti's secretary. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 116–18 (testimony of Melvin C. Weinberg).)

More disturbing than Weinberg's failure to record the full contents of the conversations that he did record is the FBI's indifference to Weinberg's conduct. There is no evidence to suggest that, during the covert stage of the investigation, the FBI ever compared telephone toll records to tapes in an attempt to evaluate the gravity of Weinberg's taping omissions. Special Agent Amoroso testified on cross-examination that he had instructed Weinberg to tape only the portion of the conversation with the suspect and that he had trusted Weinberg not to have omitted additional, relevant conversation:

---

[26] Former Assistant Attorney General Heymann has testified, "A number of devices are available to confirm the cooperation of the informant. These include instructing the informant to record all telephone calls relating in any way to the operation and regularly checking the informant's use of the telephone through scrutiny of toll records or even through the use of a pen register device." (House Jud. Subcomm. Hrg., June 3, 1982, (written statement of Philip B. Heymann at 28–29).)

> Q: [S]ometimes when you listen to the tape [of conversations between Weinberg and suspects] you can tell that the beginning of the conversation was not recorded, couldn't you?
>
> A: Yes.
>
> * * * * * * *
>
> Q: Did you say to him, Mel, what happened to you, why didn't you get the beginning of the conversation?
>
> * * * * * * *
>
> A: At that time, no. I knew why.
>
> * * * * * * *
>
> Q: Well, what did you know as to explain why he didn't get the beginning of the conversation?
>
> A: Well, you are referring to conversations with the mayor. And what would happen in those conversations would be in order to get to the mayor you would have to go through maybe two secretaries, the initial operator, then a secretary and then possibly the mayor's secretary, and then to the mayor himself. So on occasion what would happen was that Mr. Weinberg would not record that portion until the mayor actually got on the telephone himself.
>
> Q: I see. So what you were taking Mr. Weinberg's word for was the fact that he was saving the government some money in not using the tape at the beginning of that conversation?
>
> A: No. I am not taking his word for it. It happened on a few other times where the mayor's secretary had been on and he had talked to her for a number of minutes before the mayor had come in, come on, an innocuous conversation that had no value.
>
> Q: *But you told him to tape record the whole conversation?*
>
> A: *With the mayor.*
>
> Q: *So the only way that you would know that Mr. Weinberg didn't start taping at the beginning of the conversation is what Mr. Weinberg told you?*
>
> A: *Correct.*
>
> Q: *And you were inclined to believe what he told you.*
>
> A: *Correct. (Myers* Trial Tr. 940-43 (emphasis added).)

In contrast to Amoroso, Senior Supervisor Good offered the different excuse that it was necessary for Weinberg to avoid recording the beginning of telephone calls, because the credit card number the FBI used in the investigation had to be kept secret. (Sel. Comm. interview of John Good, July 13, 1982.) This explanation is even more unpersuasive. Since nobody but prosecutors and FBI personnel heard the tapes during the covert stage, Good's excuse requires one to believe that he thought that the FBI's Abscam credit card number had to be kept secret from other FBI personnel and prosecutors, who, Good appears to presume, could not be trusted not to misuse or to reveal the number.

Weinberg's practices—apparently condoned by Amoroso and Good—contrast sharply with the careful, thorough procedures used by Special Agent Michael Wald while he was posing as Michael Cohen in Philadelphia in January 1980. Wald's telephone contacts and meetings with Representative Myers in January 1980 can be reconstructed with precision, because Wald recorded every portion of every telephone call he made to Myers' Congressional office in that period, whether or not Myers was available. Wald, who was from the FBI's Philadelphia Field Office, even recorded, with an explanatory preface, his calls that resulted in busy signals, his repeated attempts to obtain an unoccupied line, and his conversations with telephone operators. He also recorded calls placed from pay telephones and hotel rooms. *(See, e.g., Myers* Gov't Trial Ex. 9A; [Deleted].) Wald, unlike Good, Amoroso, and Weinberg, thus heeded the Law Enforcement Assistance Administration's emphasis on the importance of taping all portions of all conversations with suspects in an undercover operation, without regard to the likely probative value of the tapes:

> All tapes should be kept, even though the recording of an incident (conversation) or transactions is unintelligible or of no value. Even if only a "hello" or "goodbye" can be made out, it disarms a possible defense contention that conversation detrimental to the prosecution was deliberately erased. A general rule is that a bad tape may have some value, and the prosecutor should make the determination. (U.S. Dep't of Justice, Law Enforcement Assistance Administration, *Property Crime Program: Undercover Project Manual,* 5-26 (1981).)

Furthermore, Weinberg's failures to record portions of conversations were not limited to the opening minutes of conversations. Three tapes have become the focus of allegations that Weinberg deliberately created gaps in recordings by switching his tape recorder out of the "record" mode during the conversations. These tapes are conversations between Weinberg and Errichetti on July 29, 1979, and July 31, 1979, and a conversation between Weinberg and Katz on July 14, 1979. *(See Myers* Gov't Trial Exs. 19, 21; [Deleted].) At the *Myers* trial, evidence was adduced concerning the presence of audible clicks and an interruption of the recording in the July 29 and July 31 tapes. Weinberg testified that he recalled the recorder's having been knocked off a table during both those conversations and suggested that any resulting defects may have resulted from that. *(See Myers* Trial Tr. 1638-40, 1644, 1882-84.) He denied having deliberately stopped recording in the middle of either conversation. *(See id.* at 1885, 1953-54; *Jannotti* Pre-trial D.P. Tr. 7.26-.30.)

The defendants' audio expert testified that his examination had revealed that the July 29 tape had two deliberately caused defects: an over-recording on previously recorded material, which lasted for 1.9 seconds, and a manual stop-start. He testified that the July 31 tape also reflected one manual stop-start. *(See Myers* Trial Tr. 3322-23.) The defense expert unequivocally rejected the possibility that any of these defects had been caused by a fall sustained by the recorder. *(See id.* at 3324.) Comparison of telephone toll records and the tapes suggested that the potential gap was less than one minute in the July 29 tape and less than two minutes in the July 31 tape. *(See id.* at 3350–64, 3369–70.) An FBI tape expert who had observed the tests performed by the defense expert testified that he could not reject the possibility that a fall of the recorder had caused the abnormalities, but he had not himself performed any laboratory test. *(See id.* at 3387–95.) It appears, from the implausibility of Weinberg's testimony and from the analysis performed by the defendants' audio expert, that Weinberg deliberately created gaps in the recordings of July 29, 1979, and July 31, 1979.

The controversy surrrounding the third tape gap began during the *Myers* due process hearing, when Strike Force Chief Puccio disclosed to the court and to the defendants the existence of an irregularity on the July 14, 1979, tape of a conversation between Weinberg and Katz. (*See Myers* D.P. Tr. 2512.) Puccio reported the conclusion of the FBI's audio expert that a 57-foot gap had been caused by a move from the "record" to the "play" mode and back to "record" during the conversation. (*See id.* at 2513–14.) The FBI expert testified that four minutes and 46 seconds of tape had elapsed with the recorder not recording and that in that period the recorder may have been stopped altogether for some additional time. (*See id.* at 3834–36; *Myers* D.P. Exs. 87, 88.) He said that his findings were consistent either with a deliberate manual stop or with the tape recorder's having been dropped. (*See Myers* D.P. Tr. 3877.) Based on the existence of other unrecorded portions of taped conversations, the expert's analysis, and the substance of the conversation surrounding the gap on the July 14, 1979, tape (*see* pages 126–27 *infra*), the Select Committee concludes that it is likely that Weinberg deliberately created a gap in the recording of his conversation with Katz.

Also disturbing is the lack of interest the FBI has manifested in the issue of the integrity of its Abscam tape recordings. There is no evidence indicating that, when it learned of suspicious gaps in tapes of conversations involving Weinberg, the FBI took any action to attempt to identify the source of the gaps. In fact, the available evidence suggests that no attention was focused upon the problem until after defendants had raised the issue in court proceedings. (*See Myers* D.P. Tr. 3070–75, 3087–90, 3097–3104, 3806–08.) In Operation Lobster, by way of contrast, agents prepared a memorandum, separate from the transcript, identifying and analyzing any defect found while reviewing a tape.

(d) Agents' failure to memorialize unrecorded conversations

Just as Weinberg had instructions to record conversations, the FBI special agents assigned to Abscam had instructions to prepare written reports, on an FBI form called an FD 302, of every unrecorded conversation containing information that could be used as testimony in a subsequent judicial or quasi-judicial proceeding or that could assist a prosecutor in evaluating a case. From July 25, 1978, when Abscam received formal FBI HQ approval, to the end of that year, Special Agent McCarthy, who had primary responsibility for supervising Weinberg in that period, filed fewer than ten such reports. Special Agent Askeland, who had responsibility for supervising Weinberg in Goldcon and in Abscam activities in Florida, filed 28 reports from September 20 to October 20, 1978, but apparently filed none during the remainder of the period from July 25 to December 31, 1978.

From the time he joined the investigation in January 1979 through its termination in February 1980, Special Agent Amoroso was the agent who had the most contact both with Weinberg and with suspects. In that period Amoroso appears to have filed seven FD 302's—approximately one every two months. Amoroso testified at a due process proceeding that he was not aware of any regulation regarding the required filing of FD 302's by agents. (*See Jannotti* Post-trial D.P. Tr. 3.3-.4.) Amoroso told the Select Committee that he did not know why he had testified that way, but that he may have misunderstood the question. He said that he had understood at the time that an agent should write an FD 302 about any conversation that might become the subject of testimony. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.)

Amoroso maintained that it would have been impossible to have filed more FD 302's, because doing so would have destroyed the undercover operation by forcing the undercover agent to spend all of his time memorializing conversations. Amoroso stated further that, even when Weinberg had told him of the existence and the substance of a significant unrecorded conversation that Weinberg had had with a suspect, Amoroso had not written an FD 302 of his discussion with Weinberg; rather, Amoroso said, he had attempted to arrange another conversation in which the suspect could be induced to repeat on tape the substance of his earlier remarks. (*Id.; see Myers* D.P. Tr. 4115.) Amoroso did not explain why or how it took less of his time (1) to debrief Weinberg, (2) to discuss with Weinberg how to set up a meeting for a repeat performance on tape, (3) to supervise the meeting arrangements, and (4) to attend or to review the repeat performance, than it would have taken him to debrief Weinberg on tape or even (1) to debrief Weinberg and (2) to dictate an FD 302. Moreover, even if Amoroso thought he could obtain better evidence by staging a repeat performance on tape, it still would have taken no more of his time to have debriefed Weinberg on tape. Amoroso also did not explain how, without having taken notes on the debriefing, he could ascertain after the repeat performances whether all material statements had been repeated in a similar context. He also did not explain what was done when discrepancies arose.

Supervisor Good nevertheless has testified that the procedure described by Amoroso was the procedure that he, Good, deliberately used, instead of memorializing in writing Weinberg's description of the substance of unrecorded conversations. (*See Jenrette* D.P. Tr. 865–71 (May 14, 1982).) Good thereby plainly violated prevailing FBI policy, which, according to the manual provided to special agents and according to the testimony of Assistant Director Oliver B. Revell, required that "[a]ny material conversation that can be subject to testimony must be reduced to either a written document or, of course, recorded by other means. . . ." (Sel. Comm. Hrg., July 20, 1982, at 91 (testimony of Oliver B. Revell).) Good could not recall an instance of a written record's having been made of an unrecorded call. (*See Jenrette* D.P. Tr. 867–71 (May 14, 1982).)

Former prosecutor Puccio denied to the Select Committee that there had been any problem with respect to unrecorded conversations with suspects. Puccio stated that he believed that Weinberg had recorded, for example, all conversations with Errichetti that could feasibly have been recorded. (*See* Sel. Comm. Hrg., July 27, 1982, at 136–43 (testimony of Thomas Puccio).) Puccio also testified that "it was appropriate for him [Amoroso] not to make a report on that [debriefings of Weinberg concerning Weinberg's unrecorded conversations] in my view." (*Myers* D.P. Tr. 418.) Puccio opined, "By and large the unrecorded conversations contain little or nothing that was not already recorded." (*Id.* at 417.) Puccio did not explain how he had divined the contents of hundreds, if not thousands, of unrecorded and unmemorialized conversations. (*See id.* at 410–16.)

The excuses and explanations furnished by Special Agent Amoroso, Supervisor Good, and former Strike Force Chief Puccio are wholly unpersuasive and reflect an unhealthy disregard for the importance of obtaining and preserving valuable evidence pertaining to potential criminal defendants. Those excuses, and the practices they seek to justify, clearly conflict with FBI written policies, FBI policies articulated by ranking FBI officials, and the policies advanced by former Assistant Attorney General Heymann. Nevertheless, the Select Committee has seen no evidence to support the accusation that, in order to conceal events from defendants or courts in subsequent criminal proceedings, the prosecutors or special agents involved in Abscam deliberately refrained from memorializing conversations and from creating other written records.[27]

The magnitude of the Abscam operatives' disregard for the importance of recording and memorializing conversations is especially evident when the practices in other operations are considered. The Law Enforcement Assistance Administration has stressed to law enforcement agencies the importance of ensuring that all relevant contacts with a suspect in an undercover operation are tape recorded and of documenting any failure to tape a portion of a conversation:

> Whenever possible, the entire incident or transaction should be taped; otherwise, the defense attorney might claim that entrapment occurred during the portion of the dialogue that was not taped. . . . *If a portion of the dialogue is not taped for some reason, a notation as to the reason must be made and attached to the official documentation.* (U.S. Dep't of Justice, Law Enforcement Assistance Administration, *Property Crime Program: Undercover Project Manual* 5-26 (1981) (emphasis added).)

That policy statement and the Select Committee's examination of the practices used in several other undercover operations suggest that the lax attitude of the undercover agents in Abscam does not generally pervade the FBI and other components of the Department of Justice.

---

[27] *See, e.g., Jenrette* Post-hearing Memorandum 57–59. The only recordkeeping requirement that appears to have been deliberately dispensed with was the preparation by the FBI of a prosecution report explaining prospective testimony, which Puccio testified, reasonably, was unnecessary in light of the familiarity of his office with the investigation. (*See Myers* D.P. Tr. 406–07.)

In Operation Lobster the FBI agents in undercover roles wrote numerous FD 302's of telephone calls, meetings, and surveillance reports. Numerous FD 302's were written on telephone calls that agents had received and had been unable to record. In one four-month period of the investigation, more than 450 FD 302's were completed. In some of the FD 302's that recorded information learned from surveillance, an account by the minute, and in some cases even by the second, is given for an entire day. In addition, the agents prepared separate memoranda for unrecorded telephone calls placed or received, specifically indicating the reason the call was not recorded. In Operation Buyin, undercover agents wrote numerous FD 302's, not only about their contacts with suspects, but even about their conversations with state and local police and with government prosecutors.

(e) Deficiencies in recovering, transcribing, logging, and reviewing tapes

The laxness of the practices of the undercover agents in Abscam regarding the preservation of material evidence is further manifested by their handling of the tape recordings that were made. There appears to have been no clear procedure for the collection of recorded cassettes from Weinberg. Although Weinberg once testified that he had turned tapes over to the agents within two days of their creation (*see Jannotti* Trial Tr. 3.117), he later modified that testimony, stating: "It could have been a day, up to a week, maybe ten days. It is hard to say exactly how many days before they were turned over." (*Kelly* Trial Tr. 3790; *see Thompson* Trial Tr. 1421; *Wms.* Trial Tr. 1300; *Myers* Trial Tr. 1955, 2084; Sel. Comm. Hrg., Sept. 16, 1982, at 166, 170 (testimony of Melvin C. Weinberg).)

Weinberg testified at a trial that he had received no instructions before April 1979 concerning what to do with recorded cassettes:

> Q: [B]etween October, 1978, and April, 1979, what, if any, instructions did you receive regarding the notations you should make about who you were talking with?
>
> A: I didn't receive any instructions. I just put the name down on the cassette sometime. Sometimes I even forgot them. (*Jenrette* Trial Tr. 1319; *see* Sel. Comm. Hrg., Sept. 16, 1982, at 165, 170–71, 198–201 (testimony of Melvin C. Weinberg).)

Weinberg testified that Amoroso had instructed him in 1979 to identify on each tape cassette the date, the time, the calling location, and the called location. (*See Jenrette* Trial Tr. 1318–19.) Amoroso told the Select Committee that he repeatedly had exhorted Weinberg to put identifying information on each cassette and that Weinberg often had failed to comply. Amoroso said that, when Weinberg had made a call in his presence, Amoroso himself had marked the cassette. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.)

The FBI was entirely dependent upon Weinberg to inform it of important unrecorded telephone conversations he had had with suspects. Weinberg testified before the Select Committee:

> Q: When you would have an unrecorded conversation, and you had several with Mr. Errichetti—will you acknowledge that?
>
> A:. I maybe did, yes.
>
> Q: Did you tell the FBI when you had one of these unrecorded conversations with Mr. Errichetti?
>
> A: I would tell them I spoke to him, yes.
>
> Q: Would you tell them what the conversation was?
>
> A: If they asked me, I would tell them.
>
> Q: If they asked you, you'd tell them. Did you call them up immediately and tell them, or would you just do that in passing when you saw somebody?
>
> A: If it was anything important, I would call them up immediately and tell them. . . . Just an ordinary conversation, no.
>
> Q: If you considered it important?
>
> A: If I considered it important.
>
> Q: You'd call them up and tell them about it?
>
> A: Yes. (Sel. Comm. Hrg., Sept. 16, 1982, at 171–72 (testimony of Melvin C. Weinberg).)

Moreover, the FBI was compelled to rely frequently upon Weinberg's representations concerning recorded conversations. Weinberg stated to the Select Committee:

> Q: There was no set time, then, as to when you'd turn these over or when somebody would pick them up, as I gather from what you're saying.
>
> A: Well, no. If it was an important tape and I spoke to John [Good] and let's say that we got a name [of a new suspect] they [the FBI agents] would pick it right up. If it was just ordinary garbage that we got, it would stay until either I come back up or I see them a few days later. (*Id.* at 171.)

In earlier testimony Weinberg had explained that, "if John Good called me up and he wanted to hear one of the tapes, I would play it back to him." (*Myers* Trial Tr. 2083.) The only circumstances in which Good would have had occasion to have wanted to hear a tape, of course, would have been those in which Weinberg's description of the tape made it seem important. Weinberg testified that "if it was an important tape . . . that came in, I would call up Good and they would send an agent down to pick it up." (*Kelly* Trial Tr. 3790; *see* Sel. Comm. Hrg., Sept. 16, 1982, at 200 (testimony of Melvin C. Weinberg).)

Amoroso told the Select Committee that, in deciding which tapes of Weinberg's conversations to listen to in what order, the special agents relied in large part upon what Weinberg had written on the cassettes and on what Weinberg had told them the tapes contained. (*See* Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982; *Myers* D.P. Tr. 4046–49, 4118–19.) Amoroso claimed that either he or McCarthy had listened to each tape soon after Weinberg had delivered it, although he acknowledged that this procedure applied only to tapes identified as containing a conversation with an important middleman. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) Amoroso previously had estimated that he had listened to every tape within 30 to 60 days of its creation. (*See Myers* D.P. Tr. 4118.) Amoroso testified that he was willing to rely upon Weinberg's representations about the substance of tapes and to make decisions based upon them, because he had found Weinberg's representations always to be accurate. (*See id.* at 4119.)

The actual treatment of tapes appears to have been far more haphazard than even Weinberg's and Amoroso's testimony suggests. The tape of Weinberg's July 14, 1979, telephone conversation with George Katz, ([Deleted]), for example, was unquestionably a material, crucial contact with a middleman. It contains the first recorded description of the asylum scenario. (*See* page 79 *supra.*) In addition, it includes dialogue relevant to allegations that Weinberg received gifts. (*See* pages 126–27 *infra.*) Nevertheless, evidence adduced at the *Myers* due process hearing suggests that Weinberg did not transfer custody of this critical tape to the FBI until August 6, 1979, more than three weeks after the date of the conversation. (*See Myers* D.P. Ex. 89; *Myers* D.P. Tr. 3800–04, 4106.) Moreover, on July 16, 1979, Weinberg transferred to the FBI two other tapes of conversations held on July 14, 1979, while retaining possession of the tape of his conversation with Katz on the same date. (*See id.* at 4105–06; *Myers* D.P. Ex. 98.) This disparity may be no mere fortuity: the tape of the Katz conversation has a 57-foot gap that may well have been intentional. (*See* pages 92–93 *supra.*)

This haphazard treatment of tape-recorded evidence in Abscam contrasts sharply with recordkeeping procedures used by the FBI and by other components of the Department of Justice in other undercover operations. In Operation Lobster the undercover agents regularly submitted memoranda, approximately every other month, chronologically summarizing all consensual recordings made since the previous report. The memoranda provided the date, parties, topic, and file designation for each recording. The Lobster agents also prepared, for each consensual monitoring with a body recorder, a statement of whether the recording aided in directing the course of the investigation; resulted in the acquisition of new evidence; resulted in the acquisition of "lead" material; and protected the person using the equipment. The agents prepared reports that identified any non-consenting party monitored to ensure that he was included in the "Elsur" index, which is composed of documents known as "Elsur cards," prepared by agents to report to FBI HQ each new criminal suspect discovered through the investigation. Separate biweekly summaries reported the number of tape recordings, as well as the uses of technical equipment, recoveries of property, new cases, and other administrative developments. In addition, the FBI's Lobster files reflect the preparation of many other memoranda summarizing new information at the time it was obtained.

Similarly, the Drug Enforcement Administration (DEA) agents who worked on Operation Scorpion maintained a daily log chronologically listing all contacts with suspects, including a record of all incoming and outgoing telephone calls and of face-to-face meetings. The log stated a synopsis, the time, and the parties for each contact. The DEA's final report of the operation unequivocally found the daily log to have been "the best source for an overall review of the activities of the store [front]." The DEA maintained a separate videotape log that reflected the date, time, participants, footage, and contents of each videotaped event. Finally, a separate daily evidence log was used to preserve as evidence all documents and tapes received or created.

The government's principal argument in the criminal trials resulting from the Abscam investigation was that the video and audio tapes were the heart of Abscam and that, to learn what had happened in Abscam, one needed only to examine the tapes. (*See, e.g., Myers* D.P. Tr. 360; Sel. Comm. Hrg., July 22, 1982, at 53 (testimony of John Good); Sel. Comm. Hrg., July 27, 1982, at 137 (testimony of Thomas Puccio).) The Select Committee availed itself extensively of that opportunity: it obtained from the FBI and from other components of the Department of Justice, and it studied, hundreds of transcripts of tapes of meetings and telephone conversations; it viewed many of the video tapes of crucial meetings; and it listened to many hours of audio tapes. From the amount of time it took to perform those tasks, the Select Committee obtained an appreciation for the mammoth logistical problems generated by an undercover operation of Abscam's scope. The extent of those problems suggests that in several ways the FBI is not presently equipped to manage satisfactorily an undertaking of Abscam's scale without significantly reducing the scope of its other law enforcement activities.

2. Handling of tape recordings received by the FBI.

The Select Committee learned from FBI officials that many of the audio tapes were not transcribed until several months after they had been recorded. Former Special Agent Walter Distler, who had been assigned in August 1979 to administer the tape recordings in the custody of the Hauppauge Resident Agency, testified about the procedures used to transcribe the tapes. (*See Myers* D.P. Tr. 3790–814; *cf. id.* at 3066–68.) Distler estimated that in August 1979 there had been a backlog of almost 100 tapes—a substantial percentage of the tapes that had been recorded by then—that needed to be transcribed. (*See id.* at 3804.)

Special Agent Amoroso told the Select Committee that particularly significant tapes, especially tapes of person-to-person meetings, had been transcribed immediately, while other tapes had been transcribed only when there was adequate time. He also said that he had told Good the order in which tapes should be transcribed. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) In a due process proceeding, however, Distler gave testimony that contradicted Amoroso's statements:

> Q: Was there some priority system set up for which tapes got transcribed first, or did you have them on a first come, first served basis?
>
> A: Depends on the length of the tapes. The difficulty of people involved, number of people involved in the tapes. You know, it takes time to transcribe various types of tapes. Some go quickly, others take a week, maybe.
>
> Q: Who made the determination which tapes to transcribe in what order?

> A: *It really wasn't made;* we had them backed up and we see what the card reads, how much work was involved, and assign them in that particular fashion.
>
> Q: *You don't recall any instance where somebody said, 'Let's do this one right away'?*
>
> A: *I don't recall that, no.*
>
> Q: I take it telephone tapes were easier to transcribe than tapes of meetings, as a general matter?
>
> A: Generally, yes. . . . Normally, with meetings there might be four or five individuals involved, and it takes a long time, you know, to sort out who is saying what." (*Myers* D.P. Tr. 3805–06 (emphasis added).)

The handling of the tape of the July 14, 1979, conversation between Weinberg and Katz is instructive. The synopsis that Special Agent McCarthy prepared to describe the contents of the conversation reads "Misc[ellaneous] discussion re watch," referring to the discussion of the three wrist watches that Katz had given Weinberg. (*See id.* at 3811–13; *Myers* D.P. Ex. 90.) The summary fails to mention the asylum scenario or Abdul Enterprises' interest in corrupt politicians, both of which had been extensively discussed during the July 14 conversation. Moreover, the tape was not sent to be transcribed until October 30, 1979, some 14 weeks after it had been recorded and 11 weeks after Weinberg had given it to McCarthy. (*See id.*) The transcript was completed and sent to be typed on November 9, 1979. The typed transcript was received and available for circulation and review on December 18, 1979, more than five months after the tape had been recorded. (*See id.*)

Similarly disturbing lags occurred in the transcription of numerous significant tapes:

> (1) The first conversation during the covert stage in which involvement with corrupt politicians was discussed occurred on September 13, 1978, and October 6, 1978. (*See* pages 81–83 *supra.*) Although very few tape recordings were being produced in that period, those two tapes were not transcribed until March 1980, after the investigation had become overt.
>
> (2) A tape of a conversation between Weinberg and Edward Ellis (*see* pages 288–90 *infra*) on March 1, 1979, was not transcribed until April 1980.
>
> (3) The FBI cannot precisely determine the date on which the first transcript of the critical tape of the conversation among MacDonald, Errichetti, DiLorenzo, DeVito, and Weinberg on March 31, 1979, following the transfer of $100,000 was produced; but it appears that the transcript was made only shortly before July 31, 1979.
>
> (4) The taped conversations between Errichetti and Weinberg in the last few days of July, during which the first implementation of the asylum scenario was discussed and initial arrangements to pay Myers and Lederer were made, were not transcribed until August 20, 1979 (two days before the Myers meeting), and September 20, 1979 (well after both the Myers and the Lederer meetings).

(5) The tape during which Weinberg and William Rosenberg first discussed political figures in New York occurred on August 24, 1979, but was not transcribed until March 6, 1980.

(6) Conversations between Weinberg and Joseph Silvestri on October 5, 1979, and October 17, 1979, that reveal Weinberg's instructions to Silvestri were not transcribed until November 20, 1979, and December 18, 1979, respectively, well after Silvestri had duped at least one wholly innocent public official into attending a videotaped meeting with undercover agents.

(7) As a final example, the tape of October 10, 1979, between Criden and Weinberg, in which Weinberg raised Representative Murphy's name before it had been mentioned by a middleman, was not transcribed until October 24, 1979, after the undercover agents had transferred money in Murphy's presence on October 20, 1979.

Lags such as these render careful supervision of an undercover operation impossible.[28] Although, according to FBI Supervisor Michael Wilson, special arrangements were made at FBI HQ to assist with tape transcription, not enough was done.

The Select Committee recognizes that transcription of tapes is never an easy task. However, the practices followed in Abscam undoubtedly made it even more difficult. In many cases, the names of the participants and the date of the event were not contemporaneously recorded or noted, so that personnel many months later had to attempt to guess what event and whose voices had been captured on tape. Moreover, the Select Committee discovered that the handwritten descriptions currently on many of the cassettes inaccurately state both the date of, and the parties to, conversations. In some cases, single cassettes contain several conversations, the existence of only one of which is indicated on the cassettes. Moreover, the Select Committee discovered dozens of tapes that to this day have never been transcribed and that record conversations not noted on the cassette. In some cases the Select Committee, by listening to tapes, learned of evidence that could have assisted the government in its prosecutions, but that may never have been heard by an agent or by a prosecutor. One of these conversations occurred more than four years ago.

Other tapes were transcribed, but the transcripts contain serious deletions and other errors. In one transcript a passage containing evidence of the nature of Errichetti's role in a controversial fraudulent securities transaction was deleted as "non-pertinent." (*See* [Deleted] *reprinted in* 128 Cong. Rec. S 1501 (daily ed. Mar. 3, 1982).) Omitted entirely from the same transcript was a dialogue in which Errichetti told Amoroso and Weinberg that New Jersey Casino Control Commission Vice-Chairman MacDonald's willingness to help Abdul Enterprises obtain a casino license was unrelated to his receiving money and in which Weinberg replied that he had known that was true. (*See* [Deleted] *reprinted in* 128 Cong. Rec. S 1503 (daily ed. Mar. 3, 1982).)

---

[28] Former Assistant Attorney General Heymann has testified,

"A review should generally be conducted after any significant meetings between the agents or informants and the subjects of the investigation, and should cover such issues as compliance with rules regarding recordings, contacts with subjects, the manner of approaches to subjects, and the appropriateness of any offer to engage in illegal activity. This type of review, however, depends upon the prompt availability of consensual recordings or transcripts of all meetings and phone calls." (House Jud. Subcomm. Hrg., June 3, 1982 (written statement of Philip B. Heymann at 29).)

A transcript of a March 1, 1979, conversation between Weinberg and businessman Edward Ellis, which became one of the foci for Assistant United States Attorney Edward Plaza's criticism of Weinberg and of Weinberg's FBI supervisors, escaped the scrutiny of the Select Committee until it was found undated amidst a stapled group of many transcripts of other conservations that had been recorded on other dates but on the same tape. The undated transcript of the March 1 conversation referred to Ellis as "Edward Allen (Ph[onetic])." (*See* [Deleted])

In another transcript, Errichetti's and DeVito's references to Congressman Lederer appear as "A letter." (*See* [Deleted]) Another transcript reports "touch of cash" as "succotash." (*See* [Deleted])

More generally, the tape transcripts developed by the FBI are littered with the word "inaudible" in the place of words used by the speakers. Although the sound quality of many of the tapes was unavoidably poor because of background noise and similar problems, in numerous instances the transcripts appear to represent the efforts of someone totally unfamiliar with the case. Had these tapes been reviewed by special agents with Abscam responsibilities, many of the transcripts could have been significantly improved, especially because portions labelled "inaudible" were quite audible.

Special Agent Amoroso told the Select Committee that, because of the time-consuming nature of the task, he had not compared completed transcripts to tapes, except for tapes about which he had been preparing to testify in court proceedings. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) FBI officials told the Select Committee, however, that three steps were used to transcribe the Abscam tapes: A secretary had attempted to create a transcript from the tape; an agent had reviewed the transcript to make corrections; and, finally, an agent involved in Abscam had attempted to improve the transcript.

FBI officials also told the Select Committee that it took 48 hours of staff time to transcribe one hour of tape. Although this may seem to be an extraordinary investment in agent and clerical time, the Select Committee notes that in Operation Buyin, the FBI field operatives estimated an average transcription time of 105 hours per hour of tape, more than double the Abscam figure, which they allotted as follows:

	Hours
Duplication and paperwork	2
Initial transcription	35
First review	20
Second review	15
Third review	11
Retyping	10
Final review and proofreading	12
Total	105

Obviously, these numbers show that careful, thorough transcription of audio tapes is a time-consuming, expensive, and difficult task. The burden is intensified when the transcription is demanded to be prompt and when the tapes and transcripts must be disseminated to numerous law enforcement offices in a multidistrict investigation. Nevertheless, if the FBI intends to prosecute individuals on the basis of tape recorded promises, it simply must develop and adhere to mandatory procedures to assure systematic, complete, and accurate preparation, collection, logging, and transcription of the tapes.

3. Weinberg's claim of stolen tapes.

The FBI did not serialize or otherwise identify the blank tape cassettes given to Weinberg to record conversations with Abscam suspects. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 164–65 (testimony of Melvin C. Weinberg).) In fact, Weinberg testified that he himself had purchased some cassettes from private retail establishments when the FBI had not supplied him with sufficient tapes.[29] (*See Myers* Trial Tr. 1601, 3374.) Therefore, it is impossible to determine whether Weinberg ever deliberately destroyed or accidentally lost any tape recordings of his telephone conversations and meetings with suspects. Weinberg has claimed that he never destroyed or erased a tape. (*See Jannotti* Pre-trial D.P. Tr. 7.27–.30.)

Weinberg has maintained, however, that tapes of conversations were stolen from his luggage during an airline flight on January 23, 1980. The defendants have alleged that, to conceal his actions, Weinberg deliberately destroyed tapes and falsely stated that they had been stolen. (*See Myers* Criden Appeal Brief 102–07.) The government has responded, however, that Weinberg had no need to resort to such a complex ruse, because he could have merely concealed from the FBI the existence of any tape recording he wished not to report, rather than fabricating a story about a theft. (*See Myers* Gov't Appeal Brief 107; *Myers* Trial Tr. 3410.) Although the government's point is well taken, it is conceivable that Weinberg felt compelled for investigative reasons to report the existence, and the partial substance, of the conversations and to claim that he had recorded them, but that he had been unwilling to furnish the tapes.[30]

Because of the FBI's poor supervision over Weinberg and its lax recordkeeping procedures in Abscam, it is impossible to determine whether the tapes were stolen, were lost, were destroyed, or never existed. Weinberg's numerous self-contradictions and obvious lies under oath, as shown below, suggest, however, that the tapes were not in fact stolen.

On January 23, 1980, Special Agent Brady picked up Weinberg, who had flown from Florida, at LaGuardia Airport and drove him to the JFK Hilton, where they met Good and Amoroso. (*See Myers* Trial Tr. 3185–87.) Brady testified that Weinberg had later claimed to have discovered, while searching his luggage for cigars at the hotel, that his cigars and "three or four" Abscam tapes had been removed from a compartment of his suitcase. (*See id.* at 3186–

---

[29] Special Agent Anthony Amoroso told the Select Committee, contrary to Weinberg's testimony, that Weinberg had never complained about having been given insufficient tapes. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.)

[30] Moreover, it is rather disconcerting to hear the government respond to a charge that its informant destroyed a tape by stating that he had no need to do so because the FBI had used procedures that enabled him to conceal conversations, meetings, and recordings.

89.)[31] Brady also testified that on January 23, 1980, Weinberg delivered to him at least two other tapes. (*See id.* at 3413.)

At the *Myers* trial on August 19, 1980, Weinberg testified that all of the tapes in his suitcase had been stolen. (*See id.* at 1832–39.) He did not explain where the tapes he had given to Brady on January 23, 1980, had been stored during the flight. He also was unable to recall the participants in the stolen taped conversations. (*See id.* at 1840–42.) At the same hearing, Good testified that, when he had learned of the missing tapes on January 23, 1980, he had "made several phone calls in connection with the theft," but had not thought it necessary to memorialize the event in writing. (*See id.* at 3407–08.) Good testified in response to a question from Judge Penn that Weinberg had not been "able to identify what conversations were lost," but that Weinberg had told him that he "didn't believe that those conversations were really pertinent to anything." (*Jenrette* D.P. Tr. 455–57 (Nov. 13, 1980).) Subsequently, however, Good contradicted himself and testified that it was another agent, not he, who had debriefed Weinberg. (*See id.* at 859–60 (May 14, 1981).) Thus, it appears that none of the three agents present on January 23, 1980, thought it advisable to debrief Weinberg concerning the participants and substance of the missing conversations and immediately to create a written record of that debriefing.

On September 17, 1980, Weinberg testified in the *Jenrette* trial that he had told Good what he had remembered of the contents of the lost conversations, which "had to do with two other cases." (*Jenrette* Trial Tr. at 1461–62.) Weinberg did not identify the "two other cases"; nor did he explain how he had managed to remember this fact in the month that had elapsed since his *Myers* testimony. Weinberg described the suitcase from which he alleged the tapes had been stolen, and he stated, "The recorder was in there, too, but they didn't take the recorder." (*Id.* at 1462.) His description of the bag contradicted the one he had given in the *Myers* trial less than one month previously. (*Compare id. with Myers* Trial Tr. 1941.)

On September 25, 1980, Weinberg again testified about this incident. This time he falsely stated that all tapes he had had with him on January 23 had been stolen and that the only tapes he had turned in to the FBI in that period had been picked up by an unknown agent from Weinberg's home in Florida, in Weinberg's absence, a few days before January 23. (*See Jannotti* Post-trial D.P. Tr. 2.21–.24.) FBI records show, consistent with Special Agent Brady's *Myers* testimony, that Weinberg had given Special Agent Brady tapes in New York on January 23. (*See Myers* Trial Tr. 3413.)

One month later Weinberg testified that cigars and three tapes had been stolen from the outside compartment of his suitcase, but that suits in the locked inside portion of the suitcase had not been stolen. He said that his tape recorder had been in another bag, but that, not having remembered this initially, he had reported the recorder stolen as well. (*See Alexandro* Trial Tr. 494–96.) He contradicted that testimony, however, before the Select Committee, where he testified that nothing had been in the carry-on bag except for cigars and tapes. (Sel. Comm. Hrg., Sept. 16, 1982, at 175 (testimony of Melvin C. Weinberg).) He did not attempt to explain to the Select Committee his earlier testimony, nor did he explain why he had failed to detect at the airport that the airline had returned to him an entirely empty suitcase, why he had placed cigars and tapes in the outside pocket of an otherwise empty bag, or why he had checked an almost empty carry-on bag with the airline.

---

[31] Plaza and Weir have testified that they had first heard from Special Agent Houlihan that Weinberg had claimed that between 15 and 20 tapes had been stolen. (*See Myers* D.P. Tr. 1456, 2057–58; *Jenrette* D.P. Tr. 328–33 (May 12, 1981); *id.* at 595–97 (May 13, 1981).) Houlihan testified that he believed that he had heard the higher figure from Good within a few days of the event. (*See Myers* D.P. Tr. 1655–59.) Good denied having heard a double-digit number contemporaneously. (*See id.* at 2628.)

Moreover, at the *Myers* trial, Weinberg had testified that he had checked two pieces of luggage: a carry-on suitcase, which had contained suits and shoes in the inside compartment and tapes and cigars in the outside pocket, and a hanging garment bag, which had contained shirts and underwear. (*See Myers* Trial Tr. 1940–41.) He did not explain why he had packed his suits in a carry-on bag while placing his underwear in a garment bag. He also had testified that these had been his only two pieces of luggage and that he had carried nothing onto the airplane. (*See id.* at 1941.) Before the Select Committee, however, Weinberg testified that he had had with him a briefcase containing his tape recorder. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 176 (testimony of Melvin C. Weinberg).)

Weinberg's testimony that the tape recorder had been in another piece of luggage clearly contradicted his statement under oath in the *Jenrette* trial. Weinberg had not testified, as he has since claimed he had, that he had erroneously believed that the tape recorder had been in the carry-on bag and, hence, had mistakenly reported it as stolen. Rather, he had testified that he had discovered, after checking, that the recorder had not been removed from the carry-on bag. (*Compare Alexandro* Trial Tr. 494–96 *and* Sel. Comm. Hrg., Sept. 16, 1982, at 175–76 (testimony of Melvin C. Weinberg) *with Jenrette* Trial Tr. 1462.) Weinberg also contradicted himself on this issue before the Select Committee, first testifying that "[t]he recorder was in the other part of the bag," but stating minutes later that it had been in a different bag. (*Compare* Sel. Comm. Hrg., Sept. 16, 1982, at 175 (testimony of Melvin C. Weinberg) *with id.* at 176.)

Any remaining elements of Weinberg's testimony that he had managed to avoid contradicting in his foregoing appearances appear to have been contradicted by his testimony at the *Jenrette* due process hearing in May 1981. Although Weinberg repeatedly had testified previously that he could not remember the substance or participants of any of the conversations on the stolen tapes, he testified on May 15, 1981, some 16 months after the tapes had been recorded, that one of the tapes had contained a conversation in which Rosenberg had asked when he would get his money and that another had contained a call from Criden about Abdul Enterprises' activities in Philadelphia. (*See Jenrette* D.P. Tr. 1099–101 (May 15, 1981); *cf.* Sel. Comm. Hrg., Sept. 16, 1982, at 177 (testimony of Melvin C. Weinberg).) Weinberg said that he could not remember the contents of the third call, except that it was not important, but he purported to paraphrase dialogue from the other two. (*See Jenrette* D.P. Tr. 1100–04 (May 15, 1981).) Weinberg also testified that he had briefed Amoroso at the time about the contents of the tapes. (*See id.* at 1103-04.) He was unable to explain his suddenly improved ability to recollect the substance of the tapes. (*See id.* at 1111-13.)

At the *Jenrette* hearing Weinberg also purported to identify the suitcase from which he claimed tapes had been stolen. (*See id.* at 1097-98 (May 15, 1981); *Jenrette* Gov't D.P. Ex. 4.) He testified that, in addition to cigars and tapes, the carry-on bag had held suits, shirts, and, possibly, toilet articles and shoes. This contradicted his testimony on three other occasions. (*See Jenrette* D.P. Tr. 1118 (May 15, 1981).) For example, this testimony conflicted with the testimony he had given five weeks previously that no clothing had been in the carry-on bag. (*See Wms.* Trial Tr. 1327.) Further, he stated that he never locks his luggage, thereby contradicting his testimony in *Alexandro* that he had locked the inside compartment because it had contained his suits. (*Compare Jenrette* D.P. Tr. 1096, 1098, 1119 (May 15, 1981) *with Alexandro* Trial Tr. 495.)

Although Weinberg had previously consistently testified that he had not discovered the theft until he had arrived at the JFK Hilton, and although Special Agent Brady had corroborated this version, Weinberg testified on May 15, 1981, that he had noticed the missing items at the airport. He also testified for the first time that he had reported the theft to the airline. (*See Jenrette* D.P. Tr. 1096-97, 1119, 1129-30, 1134-35 (May 15, 1981).) That was false: He previously had testified, and the airline had confirmed, that he had not filed a claim with the airline. (*See Myers* Trial Tr. 2453-54; *Myers* Court Trial Ex. 7.) Weinberg maintained that he had known immediately that there had been a theft, because the bulge that the cigar *boxes* made in the suitcase was absent. (*See Jenrette* D.P. Tr. 1119, 1129-1130, 1134-35 (May 15, 1981).) But he previously had testified that the cigars had been packed in bundles wrapped with paper. (*See Myers* Trial Tr. 1941-42.) Moreover, he testified that, although he had reported the tape recorder as stolen because he had believed it to have been in the carry-on bag, he subsequently discovered at the hotel that the tape recorder had been in the other of his two pieces of checked luggage. (*See Jenrette* D.P. Tr. 1097, 1119-20, 1135 (May 15, 1981).) This testimony conflicted both with his prior testimony that the tape recorder had been in the carry-on bag and with his subsequent testimony that it had been in a third piece of baggage, a briefcase, that he had carried on board the airplane.

This astounding plethora of self-contradictory testimony prompted Judge Penn and counsel to engage in an extended discussion cataloging the inconsistencies that had appeared in Weinberg's testimony in that court and in the other court proceedings. (*See id.* at 1149-51, 1155-76 (May 18, 1981).) John Kotelly, a prosecutor in the case, reported to the court that Weinberg had told him previously that he believed that one of the missing tapes had included a conversation with *Kelly* defendant Eugene Ciuzio. (*See id.* at 1165.) Kotelly further stated that another government prosecutor, Stephen Spivack, had told him that Weinberg had claimed that another *Kelly* defendant, Stanley Weisz, may have been on one of the lost tapes. (*See id.* at 1166.) Kotelly reported that "to my knowledge none of the F.B.I. witnesses remembers Mr. Weinberg having a recollection for certain as to who was on the tapes back on January 23 when it was taken. At that time Mr. Weinberg was unable to recall who was on those tapes then." (*Id.*) Judge Penn then concluded that "the government should pursue the matter . . . because I am not sure that in all respects the testimony is totally consistent with what I heard previously." (*Id.* at 1172–73.) Judge Penn then expressed surprise at the FBI's lack of concern over Weinberg's handling of tape-recorded evidence. The government's counsel responded,

> I agree, Your Honor. It shows that there wasn't any, at least Mr. Weinberg wasn't acting under closer controls in terms of carrying those particular tapes with him. (*Id.* at 1176; *see id.* at 1175–76.)

4. Destruction of audio tape by an FBI undercover Special Agent.

During the course of its investigation, the Select Committee learned that on at least one occasion an FBI special agent participating in the Abscam operation destroyed an audio tape recording of a conversation between Weinberg and one of the middlemen. Accordingly, the Select Committee conducted an inquiry to learn the circumstances of that event and to determine whether other evidence had been similarly destroyed. Having done so, the Select Committee finds that the destruction of that tape was unjustified and in violation of clear FBI policy; that the special agent who destroyed the tape concealed his act for approximately one year before revealing it; that upon being told of the act, the Department of Justice immediately provided the information to the grand jury before which the special agent in question had appeared; and that there is no evidence that any other FBI special agent destroyed or altered any other audio or video tape in the Abscam operation.[32]

On December 12, 1979, Special Agent Martin F. Houlihan of the FBI's Newark, New Jersey, Field Office was at the Playboy Hotel in Great Gorge, New Jersey, with Melvin Weinberg. Earlier that day middleman Joseph Silvestri had left a message for Weinberg to call him. Before Weinberg placed the call, Houlihan assisted him in setting up new recording equipment that Houlihan had taken to Great Gorge. The equipment included a listening device for use on a telephone.

When Weinberg placed the call, Houlihan was with him and the recording equipment was operating. Houlihan heard Weinberg's words, but could not hear what Silvestri said. The conversation lasted for approximately two minutes and focused on a man named DeLuca, whom Silvestri had introduced to Abscam operatives and who had met with Weinberg and Tony DeVito (Special Agent Anthony Amoroso) earlier that day. Principally, Weinberg attempted to elicit from Silvestri the identities of DeLuca's supposed La Cosa Nostra connections.

Shortly thereafter, with no one else present, Houlihan listened to the tape and found that only Weinberg's voice had been recorded. Houlihan concluded that he had used the wrong jack or had failed to place the listening device on the telephone in the proper manner. Angry and embarrassed at his mistake, and believing that the tape was, in its imperfect state, of no evidentiary value, Houlihan discarded the entire tape cassette. He cannot explain why he discarded the cassette, rather than merely erasing the portion embarrassing to him, except by reference to the magnitude of his anger and embarrassment.

---

[32] The facts surrounding the destruction of the one audio tape are generally discussed in the letter from Oliver B. Revell, Assistant Director, Criminal Investigative Division, FBI, to Senator Charles McC. Mathias, Jr., dated November 12, 1982, in response to a request by the Select Committee's Chief Counsel.

Houlihan's destruction of the December 12 tape clearly violated policies established by the Director of the FBI. On November 7, 1977, the Director ordered that all field offices were to postpone indefinitely the destruction of tapes, transcripts, and other specified materials. That rule was reaffirmed in an airtel sent to all field offices by the Director on March 12, 1979. The March 12 directive appears to establish ten years as the minimum retention period.

On December 11, 1980, Houlihan testified before a federal grand jury in Newark, New Jersey, in connection with Abscam. On December 15, he contacted and met with Department of Justice Special Attorney Reid Weingarten, volunteered the information described above, and asked whether he should have provided, or should return to provide, that information to the grand jury. In accordance with Weingarten's advice, Houlihan reappeared before the grand jury on December 18, 1980, to provide that information.

FBI officials have informed the Select Committee that no disciplinary proceeding against Special Agent Houlihan has been commenced or will be commenced until final judgments have been reached in the various Abscam prosecutions.

Having reviewed more than 20,000 Abscam documents, including telephone toll records, audio tapes, video tapes, FD 302's, handwritten notes taken during conversations, and internal memoranda, and having heard and read testimony, interview statements, or both, of every Abscam defendant and middleman, the Select Committee has found no evidence that any FBI special agent destroyed or altered any Abscam tape other than that of December 12, 1979, described above. In addition, Assistant Director Oliver B. Revell has informed the Select Committee that at his direction FBI Abscam files have been reviewed and relevant personnel contacted and that no indication of any additional tape destruction or alteration has been found.[33]

The Select Committee is, of course, dismayed at Special Agent Houlihan's violation of clear FBI policies governing the retention of audio tapes. The Select Committee finds, however, that the weight of the available evidence shows that Houlihan's act was motivated by self-reproach, not by venality, and that the tape in question, having been of only one-half of a brief conversation that had occurred shortly before Abscam's covert phase terminated, would have been of almost no value in any of the prosecutions that have occurred to date. The incident does provide, however, yet another demonstration of the importance of having the FBI indelibly premark and number each tape that is released for use and of having the FBI keep a daily log of the return of its tapes.

---

[33] There have been several other vague allegations of misconduct by agents regarding tapes, but none of these has been clearly enough established or alleged to be seriously credited. First, Plaza and Weir have testified that they had been told in early 1980 that approximately 100 tape cassettes had been lost. Plaza testified that he had received this information from Houlihan and that he believed that the misplaced tapes had been located. (*See Myers* D.P. Tr 145–55; *Jenrette* D.P. Tr 329–35 (May 12, 1981).) Weir testified that he had discussed the missing tapes with Puccio, but Weir was unclear whether the tapes had been recovered. (*See Myers* D.P. Tr. 2057.)

Second, Marie Weinberg has described an incident in which she alleged that one month after Special Agent Askeland and another agent had collected 44 Abscam tape cassettes from the Weinberg home, they telephoned her to ask where the tapes were, apparently "having misplaced them." (*See* 128 Cong. Rec. S 1483, S. 1495 (daily ed. Mar. 3, 1982).) Askeland executed an affidavit, apparently describing the same incident, in which he denied ever having misplaced those or any other Abscam tapes. (*See id.* at S 1519.)

B. OTHER LOGISTICAL EVIDENTIARY FAILURES

Another investigative technique commonly used by the FBI and the Department of Justice is the collection and analysis of telephone toll records obtained from telephone companies by subpoena. The analysis of telephone toll records may be of critical importance in an undercover operation such as Abscam, which relied heavily upon an untrustworthy cooperating individual, Mel Weinberg, who may not always have been forthcoming about his whereabouts and about his contacts with suspects. Similarly, telephone records are instrumental in establishing and dating contacts among suspects of the investigation.

The FBI made available to the Select Committee the computerized inventory of subpoenaed telephone toll records documenting various telephone conversations between Abscam suspects and government operatives, including Weinberg. The inventory includes data about these telephone toll calls, including the date and hour of call. Unfortunately, probably through computer programming error, the inventory does not designate whether calls were made before noon or after noon. This peculiar gap in the telephone records renders them of limited use: It often is impossible to determine from the records whether Weinberg was at a particular location at a time when others have alleged they met him. The FBI was unable to explain why this information was not provided on their inventory. Even more inexplicable is why agents and prosecutors years ago did not insist on being provided a more complete inventory. Although the logistical difficulties of processing subpoenaed toll records clearly expand for an extended multidistrict investigation like Abscam, the importance of being able to use the records for the purposes described above also increases concomitantly.

Similar problems of errors and omissions have arisen in the FBI's and Department of Justice's handling of written material. For example, defendant Feinberg's attorney obtained through a Freedom of Information Act request a copy of a memorandum dated March 26, 1979, from Brooklyn Organized Crime Strike Force Chief Thomas Puccio to the Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice, Kenneth Muellenberg. The memorandum advised that Feinberg and Weinberg had known each other for many years and that, because Feinberg knew of Weinberg's criminal background, Feinberg's willingness to do business with Weinberg evinced his criminality. All parties now agree that the statements in the memorandum are wrong, because Feinberg had never met or heard of Weinberg before Abscam.

The Department of Justice has offered two lines of defense for these inaccurate representations in the Strike Force memorandum. First, the Department has contended that the memorandum was written by a Strike Force attorney, Lawrence Sharf, who had just been assigned to the case. The Department claims that, although Sharf was mistaken, everyone else working on the case knew that there had been no prior relationship between Feinberg and Weinberg and could not have been misled. Second, the Department has argued that the memorandum was never sent to Washington. Thus, the Department's explanation for the demonstrably false internal document is that it does not matter what the memorandum states because (1) everyone but the author of the memorandum knew the correct facts, and (2) even if someone did not know the true situation, he could not have been misled, because the memorandum was never disseminated. The Department has left unanswered why it had its only unknowledgeable attorney writing the memorandum and why a memorandum addressed and initialed was never sent to the addressee.

Equally egregious are some of the factual statements contained in FD 302's and contemporaneous memoranda written by FBI agents. Another section of this report (*see* pages 206–07 *infra*) describes the errors contained in reports submitted by Special Agent McCarthy in the *Williams* investigation regarding the dates and participants of meetings held on January 10–11, 1979. Similarly, the Select Committee devoted extensive attention to an attempt to reconstruct the events surrounding transactions with forged certificates of deposit and letters of credit in 1978 and 1979 involving numerous criminal suspects, including defendants Errichetti and Rosenberg. The FBI failed to maintain records documenting the source and nature of billions of dollars in fraudulent transactions and explaining Weinberg's role in those transactions. On October 30, 1978, Special Agent John McCarthy received $600 million in fraudulent securities from Weinberg, who asserted that Rosenberg had provided them to him. McCarthy made no written record documenting the transfer of the securities; instead, he merely initialed the securities and dated the package. Similarly, on November 20, 1978, Weinberg gave $600 million of fraudulent securities from Rosenberg to Special Agent Gunnar Askeland, who failed to document the event in writing. The failures of the special agents to document these transfers or to debrief Weinberg about the fraudulent securities and to memorialize the debriefing has contributed to prolonged subsequent confusion, both inside and outside the Department of Justice, about the date, amount, source, and Weinberg's role in the production of the securities. Those failures are especially noteworthy in view of the fact that the fraudulent securities are contraband and evidence of probable crimes.

One of the only reports relating to the securities transactions, known as the Fuller 302, is an FD 302 written by Special Agent Myron Fuller on March 11, 1979, to record Weinberg's transfer to him of various blank and completed securities. (*See Myers* D.P. Ex. 86.) The document does not explain what the securities were, why Weinberg had them, how long he had had them, where he had obtained them, why he was giving them to Fuller (who had not been assigned to Abscam for some three months), why he had not turned them into agents of the Hauppauge Resident Agency a few minutes from his own home, and what Fuller was supposed to do with them. To this day, the government does not know what those securities represented, what Weinberg was doing with them, when he obtained them, or why he chose to give them to Fuller on that day.

The difficulties that the FBI and the Department of Justice have in handling their written communications extend to the prosecutorial phase, as well. Two examples of a serious problem appear from the *Myers* trial and post-trial due process proceedings. One issue at trial related generally to allegations that Weinberg had solicited gifts from suspects of the investigation and, more specifically, to the circumstances under which George Katz had given Weinberg three expensive wrist watches. (*See* pages 123-27 *infra*.) Supervisor Good testified at the trial that he believed that Special Agent Amoroso had prepared a memorandum when Weinberg had turned the watches in. (*See Myers* Trial Tr. 3501-11.) Judge Pratt ordered the government to search overnight for any such memorandum. Prosecutor Puccio indicated the next day that there was no Amoroso memorandum. (*See id.* at 3643-44.) In fact, however, there was a memorandum, and it was later produced at the post-trial due process hearing in the *Jannotti* case in Philadelphia.

In the subsequent due process hearing in the *Myers* case, Good was asked what he had done to try to find the Amoroso memorandum pursuant to the court's order. Good testified that he had telephoned the Brooklyn-Queens FBI office and had asked for a search, but that he then "was informed that the Court had moved on to something else, [and] it was not necessary to continue the search." (*Myers* D.P. Tr. 2585; *see id.* at 2979-84.) Good said he could not remember who had told him that, simply because the trial had moved on to something else, the search for the memorandum need not continue. (*See id.* at 2585, 2984.) The Select Committee finds Good's testimony about the manner in which the FBI and the Department of Justice simply disregarded an outstanding order of the court to be disturbing and unprofessional.

The Select Committee has noted former Assistant Attorney General Heymann's testimony before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, in which Professor Heymann observed, "Management is as important as policy . . . . [A]ny past weakness in [the management of undercover investigations] seems to me to suggest the wisdom of heightened attention to management concerns whenever there is extensive reliance on a criminal informant. . . ." (House Jud. Subcomm. Hrg., June 3, 1982 (written statement of Philip B. Heymann at 1-2).) Professor Heymann concluded:

> Nothing, for example, might be more important to effective supervision than finding a solution to such mundane problems as the logistics of promptly obtaining, transcribing, reviewing, and filing tapes or reports of all crucial conversations in a massive, fast-moving, ongoing investigation. (*Id.* at 25.)

III. MANAGEMENT, SUPERVISION, AND CONTROL OF WEINBERG

A. ALLEGATIONS THAT WEINBERG SOLICITED AND RECEIVED GIFTS FROM SUSPECTS DURING THE ABSCAM INVESTIGATION

1. The Defendants' Allegations

Abscam defendants and members of the news media have alleged that FBI informant Melvin Weinberg solicited and received from criminal suspects under false pretenses various valuable gifts, that he converted the gifts to his personal use, that he withheld information about the gifts from the government, and that he perjured himself when asked about the gifts during Abscam judicial proceedings. The alleged gifts fall into three categories: (1) three expensive wrist watches, a Sony Betamax video cassette recorder, and $2,000 of liquor from George Katz; (2) a microwave oven, dishes, an RCA video cassette recorder, a stereo system, three Sony Trinitron color television sets, a Seiko wrist watch, an ounce of gold, and cash from Mayor Angelo Errichetti; and (3) miscellaneous gifts and unrepaid loans from Alfred Carpentier, William Rosenberg, and William Eden. In addition, it has been alleged that Weinberg unsuccessfully solicited gifts from businessman Tony Torcasio.

Weinberg has acknowledged receipt of the three watches and of several inexpensive gifts (such as two bottles of liquor) that he disclosed to the FBI contemporaneously with his receipt of the items. He has, however, denied under oath having solicited those items and having received any of the other valuable gifts itemized in the three categories above.

Defendants do not explicitly allege, and the Select Committee knows of no evidence suggesting, that Weinberg steered the investigation toward suspects who refused to furnish requested gifts or away from suspects who did furnish gifts or that Weinberg's acceptance of gifts materially affected in any other way the course of the investigation. Rather, defendants contend that Weinberg's alleged solicitation and receipt of gifts demonstrates that the government engaged in conduct amounting to outrageousness sufficient to render the criminal prosecutions violative of due process. (*See, e.g., Myers* Defendants' Submission 70.) Defendants also contend that Weinberg's acceptance of gifts and the government's ignorance of his having done so buttress their other allegations of Weinberg's unreliability and of the government's poor control over him. (*See, e.g., Myers* Defendants' Motion for New Trial 13-15.) Defendants also allege that Weinberg committed perjury by denying that he had solicited and received gifts. (*See, e.g., Wms.* Motion to Reopen 5-7.) More specifically, the *Myers* defendants allege that Weinberg's lies about his receipt of gifts prevented the jury from learning that he had misled and lied to the FBI throughout Abscam, from concluding that Weinberg's testimony thus could not be credited on any issue, and, therefore, from accurately assessing the playacting defense. (*See, e.g., Myers* Defendants' Motion for New Trial 1-2.)[34]

---

[34] With regard to this final claim, the Select Committee believes that the truth or falsity of the gifts allegations is irrelevant to the playacting defense. The Select Committee has rejected

Continued

2. Judicial Treatment of the Allegations

In his opinion in the post-trial consolidated due process hearing, Judge Pratt concluded that Weinberg had not received the microwave oven and that, except for the three watches that Weinberg had disclosed to the FBI shortly after receipt, "[t]he other evidence of gifts is simply unpersuasive." *United States* v. *Myers,* 527 F. Supp. 1206, 1233–34 (E.D.N.Y. 1981), *aff'd,* 692 F.2d 823 (2d Cir. 1982). The Second Circuit reasoned similarly, stating that "Weinberg was not likely to conceal a $350 gift [the microwave oven] when he had been forthcoming about an $18,000 gift [the three watches]." *United States* v. *Myers,* 692 F.2d at 846.

Judge Pratt concluded further that the gift allegations, even had they been established, would not have violated due process:

> [A]s to the claimed misconduct by Weinberg none of the instances, even if true, has any direct relationship to any protected right of these defendants.
>
> * * *
>
> [E]ven assuming that Weinberg in Abscam solicited gifts and loans, they were incidental to the scam and not the heart of the transaction. . . . While anything of value Weinberg received from defendants beyond the knowledge of the FBI may subject Weinberg to difficulties in his relationship with the FBI, that fact would not in any way alter or detract from the acts of the defendants. (*United States* v. *Myers,* 527 F. Supp. at 1233, 1239, 1240.)

3. Summary of Select Committee Findings

The Select Committee has determined that the weight of the evidence shows that Weinberg solicited and received gifts from Errichetti and Katz. On or about January 19, 1979, Weinberg received from Errichetti a General Electric microwave oven. In early April 1979, Weinberg received from Errichetti a stereo system valued at over $1,200. In mid-summer 1979, Weinberg received from Errichetti three Sony Trinitron color television sets. In December 1979, Weinberg received from Katz a Sony Betamax video cassette recorder and approximately $2,000 worth of liquor.

Weinberg failed to disclose to the FBI his solicitation or receipt of these gifts. When confronted, he denied to government attorneys and to the FBI that he had solicited or received them. (*See Myers* D.P. Tr. 369–70, 2602–03.) When he testified under oath before a grand jury, in trial court proceedings, and before the Select Committee, Weinberg falsely denied that he had solicited or received those gifts.

The Select Committee lacks sufficient evidence to form reliable conclusions about the circumstances of Weinberg's receipt of the three wrist watches that he admits having received from Katz in June 1979. The most probable version of these events appears to be that, although Weinberg solicited jewelry from Katz, the circum-

---

the factual basis for the defendants' playacting allegations without relying at all upon Weinberg's testimony. (*See* p. 204 n. 133 *infra.*)

Defendants also allege that several FBI special agents knowingly failed to correct Weinberg's alleged perjury, because Weinberg had covered for various of their illicit activities and was in a position to blackmail them. (*See, e.g., Myers* Defendants' Motion for New Trial 1, 15–16.)

stances under which he received the watches made it necessary for him to turn them over to the FBI, even though the FBI had not known in advance that Weinberg was going to solicit or that Katz was going to give such gifts.

The numerous allegations that Weinberg received other gifts and loans that he has not repaid have not been proven. Specifically, the Select Committee has insufficient evidence to determine whether Weinberg received an RCA video cassette recorder, a Seiko watch, an ounce of gold, or cash from Errichetti; whether he received loans from Rosenberg and Eden; and whether he received cash and miscellaneous items from Carpentier. The only significant evidence regarding these gifts is the conflicting testimony of Weinberg and of the various defendants and their confederates, none of which the Select Committee finds credible. Finally, the Select Committee has not been able to determine whether Weinberg solicited gifts from Torcasio.

4. *The Errichetti Gifts*

The allegations of gifts from Errichetti to Weinberg first surfaced on June 10, 1980, two weeks after Errichetti had been indicted in the *Myers* case. Joseph DiLorenzo, Errichetti's nephew and his principal chauffeur in 1979, appeared voluntarily with his attorney at the Trenton, New Jersey, FBI Resident Agency, where he was interviewed by Special Agent Martin F. Houlihan and Assistant United States Attorneys Edward J. Plaza and Robert A. Weir, Jr. (*See* Martin F. Houlihan FD 302, June 10, 1980, *reprinted in* 128 Cong. Rec. S 1508 (daily ed. Mar. 3, 1982) [hereinafter cited as Martin F. Houlihan FD 302, June 10, 1980].) In the course of reconstructing the dates on which he had chauffeured Errichetti to meetings with Weinberg or with the undercover agents, DiLorenzo described several occasions on which he allegedly had delivered gifts to Weinberg. (*See id.*)

DiLorenzo had testified before the federal grand jury in Brooklyn on March 27 and April 9, 1980, however, and on neither occasion had mentioned his having delivered any gift to Weinberg. Moreover, he had constructed for the grand jury a list purportedly enumerating all trips he had made for Errichetti in connection with Abdul Enterprises, and that list had included none of the trips that DiLorenzo stated in June 1980 had been made to deliver gifts. (*See Myers* Trial Tr. 3086–88.) It was only after his uncle had been indicted on May 27 and May 28, 1980, that DiLorenzo mentioned to the authorities the alleged gifts.

At trial, DiLorenzo testified that before June 10 he had not volunteered information about the gifts because he had not been asked about any gifts; but he also acknowledged that he had initiated the discussion on June 10 about gifts. (*See id.* at 3113–14, 3120.) DiLorenzo testified further that the handwritten list of trips he had supplied the grand jury had omitted those incidents because he had been asked to list meetings to which he had driven Errichetti, and he had not thought that those qualified as "meetings." (*See id.* at 3115–16, 3119–20.) Although he admitted that, on one of his alleged gifts trips, he had chauffeured Errichetti to meet Weinberg, DiLorenzo maintained that in his mind this also "wasn't a meeting." (*See id.* at 3120.)[35] The distinction between "meetings" and "trips" that DiLorenzo claims he labored under before the grand jury on two occasions is incoherent and raises doubt about his credibility.

Because of DiLorenzo's evident lack of candor either in his two grand jury appearances or in his subsequent stories about gifts, because of DiLorenzo's bias resulting from his relationship to Errichetti,[36] because of Errichetti's willingness to lie under oath about virtually all subjects, because of the inconsistencies between DiLorenzo's and Errichetti's testimony, and because of strong indications that Weinberg gave perjurious testimony in the criminal proceedings and before the Select Committee, the Select Committee has found it difficult to resolve the conflicting allegations regarding Weinberg's acceptance of gifts from Errichetti. In general, the Select Committee has been able to form a reliable conclusion concerning these allegations only when it could derive such a finding from corroborative evidence extrinsic to the testimony of DiLorenzo, Errichetti, and Weinberg.[37]

(a) The microwave oven

DiLorenzo told the Select Committee that the first gift he had delivered to Weinberg from Errichetti had been a microwave oven that he had bought with Dani Anise, Errichetti's secretary, in January 1979. This statement was consistent with DiLorenzo's testimony at trial, where he stated that Anise had asked him to accompany her to Strawbridge & Clothier in Cherry Hill, New Jersey, to help her carry the microwave oven and dishes that Errichetti had ordered. DiLorenzo also testified at the trial that he and Errichetti had met Weinberg on January 19, 1979, in the parking lot of a Holiday Inn near Exit 55 of the Long Island Expressway in New York and had delivered the oven and dishes. (*See Myers* Trial Tr. 3067–69.)

Special Agent Houlihan's report of DiLorenzo's statements at the Trenton FBI office in June 1980 indicates that at that time DiLorenzo said that it was another gift (a video cassette recorder), not the microwave oven, that DiLorenzo had delivered on January 19. (*See* Martin F. Houlihan FD 302, June 10, 1980.) DiLorenzo told the Select Committee that he believes that the Houlihan report was inaccurate and that his own version has remained consistent throughout. Nevertheless, during his interview by the Select Committee, DiLorenzo began his recounting of the events of January 19, 1979, by stating that he had delivered a video recorder on that date; he then quickly corrected himself and said that he meant a microwave oven.

---

[35] DiLorenzo testified that Errichetti was present at the delivery of the first gift, a microwave oven (*see* pp. 115–17 *infra*), in January 1979. (*See Myers* Trial Tr. 3120; Martin F. Houlihan FD 302, June 10, 1980.) Before the Select Committee, however, Errichetti implied that DiLorenzo had delivered the microwave alone. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 229 (testimony of Angelo J. Errichetti).) According to Errichetti's testimony, the only gift trip on which he accompanied DiLorenzo was the trip to deliver three television sets (*see* pp. 121–23 *infra*) several months later. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 234 (testimony of Angelo J. Errichetti).)

[36] The closeness is revealed not only by the uncle-nephew relationship and the geographic proximity of the two men's homes, but by the fact that DiLorenzo had been appointed Administrator of Energy of Camden, New Jersey, the city of which Errichetti was mayor, even though DiLorenzo at the time was only 23 years of age, had no college degree, and had no training or experience in energy management or science.

[37] The Select Committee, which obtained more evidence than was presented to Judge Pratt, disagrees with his conclusion that DiLorenzo lied about delivery of the microwave oven. *See United States* v. *Myers*, 527 F. Supp. at 1233–34.

Errichetti testified before the Select Committee that Weinberg had suggested that Errichetti give the sheik a microwave oven "to ingratiate [him]self" and that his secretary had bought the oven and on her initiative had bought dishes to go with the oven. Errichetti said he could not recall whether the oven had been given in January, February, or March of 1979. (Sel. Comm. Hrg., Sept. 15, 1982, at 228–29 (testimony of Angelo J. Errichetti).) Weinberg denied under oath having received a microwave oven from Errichetti or DiLorenzo. (*See Myers* Trial Tr. 2252–53; Sel. Comm. Hrg., Sept. 16, 1982, at 121 (testimony of Melvin C. Weinberg).)

Special Agent Houlihan testified at the trial that his investigation at Strawbridge & Clothier had revealed that Anise had ordered a microwave oven by telephone and that someone had picked it up within a day or two. (*Myers* Trial Tr. 3546.) The FBI obtained from Strawbridge & Clothier in Cherry Hill, New Jersey, a sales receipt dated January 17, 1979, bearing Errichetti's and his secretary's name and business address, for a General Electric microwave oven. The salesman named on the receipt told the FBI that he remembered Errichetti's secretary's having ordered the oven for Errichetti. (*See id.*)

The Palm Beach County Sheriff's Office found a General Electric microwave oven in the Weinbergs' house in Tequesta, Florida, in January 1982. The serial number plate had been removed from the oven, rendering tracing impossible. (*See* Affidavit of William L. Deaton, filed in *United States* v. *Williams,* March 22, 1982, at 2–3 [hereinafter cited as Deaton Affidavit].) Before her death on January 28, 1982, Marie Weinberg had stated that here husband, Mel, had taken a microwave to their Long Island home in 1978 or 1979 and had indicated that it was a gift from a friend. She stated that Good and Amoroso had seen the oven while visiting their home.[38]

---

[38] Good testified in a due process proceeding on February 4, 1981, that he had seen a microwave oven in Weinberg's *residence* during the previous spring. (*See Myers* D.P. Tr. 2618–19.) In an affidavit that he signed one year later and that the government filed in court to oppose a defense motion, Good swore that he did not recall ever having seen a microwave oven in Weinberg's *homes* in Long Island and Tequesta. (*See* Good Affidavit, filed in *United States* v. *Williams,* February 22, 1982, at 1–2, *reprinted in* 128 Cong. Rec. S. 1518 (daily ed. Mar. 3, 1982).) When confronted with this obvious inconsistency in his statements under oath, Good contended before the Select Committee that his first statement referred to a microwave oven that he had seen in Weinberg's *trailer* in Florida and, therefore, was consistent with his second statement, which referred only to "the Weinberg *homes.*" (*See* Sel. Comm. Hrg., July 27, 1982, at 42 (testimony of John Good).)

The Select Committee finds disturbing Good's giving of conflicting sworn testimony on two occasions one year apart, especially because the second statement was in an affidavit, carefully considered, with ample opportunity for Good to review records and transcripts to refresh his recollection, and under no courtroom pressure. But the Select Committee finds especially disturbing Good's attempt to justify to the Select Committee his initial error by defining common words like "home" and "residence" in Procrustean fashion. If Good's testimony before the Select Committee was truthful, it means that, at the least, he signed an affidavit so materially misleading that it even caused the government's own attorneys to conclude, and to represent to the court, that Good "did not notice any of the so-called 'gifts'." (*See* Memorandum of Law in Opposition to Defendants' Post Trial Motions, filed in *United States* v. *Williams,* February 22, 1982, at 8.)

The Select Committee is distressed by Supervisor Good's assertion that he willfully denied under oath having observed a microwave oven in Weinberg's homes (plural), knowing that he had seen such an oven in the trailer in which Weinberg often resided. While it may not be technically perjurious, such clearly misleading testimony constitutes unacceptable conduct that ranking FBI officials should not tolerate.

Continued

She also said that Mel had telephoned her in 1980 during an Abscam trial and had asked her to secrete the oven without being seen, whereupon she and her son had moved it to a nearby vacant condominium. A few weeks later, she continued, her husband had asked her to take the oven home. She stated that thereafter she saw him remove the serial number plate from the oven in their home. (*See* Marie Weinberg Affidavit, filed in *United States* v. *Kelly,* January 16, 1982, *reprinted in* 128 Cong. Rec. S. 1482 (daily ed. Mar. 3, 1982) [hereinafter cited as Marie Weinberg Affidavit].)

The FBI also located in the Stuart, Florida, home occupied by Evelyn Weinberg and frequently shared by Mel, a J.C. Penney's microwave oven. The FBI learned from the J.C. Penney Company that this oven had been sold to Evelyn Weinberg on December 29, 1978, by the West Palm Beach J.C. Penney store. (*See* Deaton Affidavit at 2, 8.) The government introduced into evidence in the post-trial due process hearing the bill and warehouse slip for the J.C. Penney oven. (*See Myers* Gov't D.P. Ex. 109A.) Weinberg testified that he could not remember the date that the oven had been purchased. (*See Myers* D.P. Tr. 4396–400.)

Weinberg's son, J.R., told the FBI that the General Electric oven had been in his family's home in Long Island and that he did not know its source or date of origin. (*See* Deaton Affidavit at 9.) Weinberg told the FBI that he did not know the source of the General Electric microwave oven. (*See id.* at 3; Sel. Comm. Hrg., Sept. 16, 1982, at 126–27 (testimony of Melvin C. Weinberg).)

The Select Committee concludes that in January 1979 Weinberg solicited and received from Errichetti and DiLorenzo the General Electric microwave oven. The combination of Errichetti's and DiLorenzo's testimony, Marie Weinberg's affidavit, the corroboration of the oven purchase by Strawbridge & Clothier, and the recovery of a General Electric oven with a missing serial plate from Weinberg's house, especially in light of Weinberg's inability to explain the origin of the microwave oven and his offer of a bill establishing the purchase of an oven clearly not the one in issue, compels this finding. It appears that DiLorenzo's inconsistency about the date of the purchase resulted from confusion over the details of fairly unmemorable events that had occurred 18 months earlier.

(b) The RCA video recorder

Special Agent Houlihan's report of DiLorenzo's interview of June 10, 1980, indicates that DiLorenzo stated that he had purchased and delivered a video cassette recorder to Weinberg on January 19, 1979. (*See* Martin F. Houlihan FD 302, June 10, 1980.) Since that time, DiLorenzo has maintained, at trial and to the Select Committee, that he gave a video recorder to Weinberg, but in March, not in January, 1979. At the *Myers* trial DiLorenzo testified that Errichetti had instructed him in late February or early March 1979 to purchase a video recorder as a gift for Weinberg to deliver to the sheik. DiLorenzo stated that he purchased the video recorder with

---

Special Agent Amoroso indicated that he thought he had seen a microwave oven in the kitchen of the Weinbergs' Long Island home, but that he had had no reason to take notice of items in their home. (*See* Amoroso Affidavit, filed in *United States* v. *Williams,* February 22, 1982, at 2, *reprinted in* 128 Cong Rec. S 1517 (daily ed. Mar. 3, 1982).)

cash at Best Products in Moorestown, New Jersey. (*See Myers* Trial Tr. 3069–71). He identified his receipt (*Myers* Def. Trial Ex. Y), dated March 3, 1979, for the $939.61 RCA video recorder (*see Myers* Trial Tr. 3070).

DiLorenzo testified that on the following day he and his girlfriend, Debra Procacci, had met Weinberg at the Ionosphere Lounge at LaGuardia Airport to deliver the RCA recorder. Weinberg had been accompanied by a woman he had introduced as Marie, his son, and a dog. DiLorenzo had placed the recorder in Weinberg's silver Lincoln Continental in the parking lot. (*See id.* at 3071–72.)

Houlihan testified that DiLorenzo had provided the receipt for the video recorder approximately one week after the June 10, 1980, interview. Houlihan also testified that DiLorenzo had stated in the interview that no one but Errichetti had accompanied him on any of his deliveries of gifts. (*See id.* at 3537–38, 3542.) DiLorenzo has contended that he lied about his girlfriend's presence to try to avoid involving her. (*See* Sel. Comm. interview of Joseph DiLorenzo, Sept. 10, 1982.) When she testified, DiLorenzo's girlfriend corroborated his testimony. (*See Myers* Trial Tr. 3224–26.)

Errichetti testified that Weinberg had told him that the sheik wanted a video recorder in order to watch X-rated films. Errichetti testified, incorrectly, that DiLorenzo, accompanied by George Norcross, had purchased the recorder at a store in Cherry Hill with money given to DiLorenzo by Errichetti's secretary. According to Errichetti, she had obtained the cash from James Meiler, who had introduced Errichetti to Criden, because Meiler had "scads of money" and had said to him, "'Anything that you need as far as money is concerned, because you don't have the money, this is the way they do business . . . I will supply the money for anything he wants.'" (Sel. Comm. Hrg., Sept. 15, 1982, at 230–31 (testimony of Angelo J. Errichetti).)[39]

Weinberg denied having received a video recorder from Errichetti or DiLorenzo. (*See Myers* Trial Tr. 2252–53; Sel. Comm. Hrg., Sept. 16, 1982, at 121–122 (testimony of Melvin C. Weinberg).) No RCA video recorder was found in 1982 in the residence he shared with Marie or in the residence he shared with Evelyn. Marie Weinberg stated that Mel Weinberg asked her during an Abscam trial in 1980 secretly to remove from their home a "Betamax video recorder" that he had "brought home" during 1979. (*See* Marie Weinberg Affidavit.) It is not clear whether she was using "Betamax" as a trade name or as a generic word.[40]

Thus, Errichetti's testimony about the alleged video recorder gift conflicted with DiLorenzo's, and DiLorenzo has admitted having deliberately lied in his June 10, 1979, interview about his girlfriend's involvement. Because those men provided false information about other Abscam issues, because no RCA video recorder was found in either of Weinberg's residences, and because there is no tangible evidence corroborating either Errichetti's or DiLorenzo's contention that Weinberg received that item, the Select Committee cannot reasonably determine from the available evidence the truth of the allegation that Weinberg received an RCA video recorder from Errichetti.[41]

---

[39] DiLorenzo stated that he knows only that he got the cash from Errichetti or from Errichetti's secretary. Meiler is deceased. The Select Committee notes that in 1979 Errichetti, according to his testimony, received over $50,000 in bribe payments, earned salaries of $48,000, and made $75,000 in securities trading. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 203–04, 210–13, 241 (testimony of Angelo J. Errichetti).) This renders Errichetti's contention about the source of the money dubious.

[40] The recovery by the FBI of a Sony Betamax from Marie Weinberg's home suggests that she may have been referring in her affidavit to that Betamax, not to an RCA, video recorder. (*See* pp. 127–28 *infra*.) In that case her affidavit does not support Errichetti's allegation that he gave Weinberg an RCA video recorder.

(c) The stereo system

DiLorenzo told Houlihan on June 10, 1980, that sometime before April 1979 Weinberg had shown Errichetti a picture of a $3,300 stereo system that Weinberg wanted for the sheik. Pursuant to Errichetti's instructions, DiLorenzo had then found a similar stereo, which he purchased with the help of a friend, George Norcross,[42] for $1,200 in cash from Hi-Fidelity House in Cherry Hill, New Jersey, and delivered to Weinberg in the last week of March. (*See* Martin F. Houlihan FD 302, June 10, 1980; *Myers* Trial Tr. 3540–41, 3544–45.)

DiLorenzo testified at trial that Errichetti had given him the picture Errichetti had received from Weinberg, which was from an advertisement for a northeastern chain store, Sam Goody, in *The New York Times Magazine,* and had told him to purchase something similar, but less expensive. DiLorenzo said that he had telephoned Norcross, who had known someone at Hi-Fidelity House who would give them a good price. DiLorenzo said that they had purchased a Harman-Kardon receiver, Genesis III speakers, and a cabinet to hold the components; he identified a copy of a sales brochure (*Myers* Def. Trial Ex. Z) that depicted the stereo and that he had received with the purchase (*see Myers* Trial Tr. 3073–76).

DiLorenzo testified that, using Errichetti's car, he had taken the stereo components to the Hauppauge Holiday Inn (where he had met Weinberg on January 19) and had delivered them to Weinberg, who was driving a pickup truck that he claimed was his brother-in-law's. DiLorenzo testified that, because Weinberg had indicated earlier that the stereo should be given to the sheik for his birthday, DiLorenzo also delivered a congratulatory letter from Errichetti for the sheik. DiLorenzo identified a copy of that letter (*Myers* Def. Trial Ex. S), which he said he had seen, at the time it was written, on the desk of Camden City Attorney Martin F. McKernan, who had drafted the letter. DiLorenzo said that Weinberg had told him that he was going to take the stereo system directly to the airport to ship to the sheik and that he needed $300 for shipping expenses. DiLorenzo had not provided the money. (*See Myers* Trial Tr. 3077–78, 3100–02).

Although DiLorenzo told Houlihan that he had delivered the stereo to Weinberg in the last week of March 1979, he told the

---

[41] Weinberg admitted to the Select Committee that he had met DiLorenzo's girlfriend "a few times." (Sel. Comm. Hrg., Sept. 16, 1982, at 122 (testimony of Melvin C. Weinberg).) Weinberg did not attempt to explain the circumstances for those meetings. DiLorenzo's girlfriend, on the other hand, testified in the *Myers* trial that she had met Weinberg twice: in March to deliver the video recorder and in September or October to deliver an envelope. (*See Myers* Trial Tr. 3124–29; pp. 151–52 *infra.*) This provides some support for the gift allegation.

[42] DiLorenzo told the Select Committee that Norcross was another of Errichetti's chauffeurs. (Sel. Comm. interview of Joseph DiLorenzo, Sept. 10, 1982.)

Select Committee that he had given Weinberg the stereo after April 1, 1979, the date on which, according to DiLorenzo and Errichetti, they clandestinely met Weinberg and on which, according to Errichetti, he shared the March 31 MacDonald bribe money with Weinberg. (*See* pages 138–49 *infra.*) DiLorenzo told the Select Committee that the Houlihan report of the June 10, 1980, interview erroneously placed the delivery of the stereo in March.

Houlihan testified at trial that he had spoken to Norcross. Norcross had confirmed that he had helped DiLorenzo purchase a stereo at Hi-Fidelity House, but had indicated that he did not know why DiLorenzo had wanted the stereo (*See Myers* Trial Tr. 3544–46.) The salesman at the Hi-Fidelity House who made the sale told Houlihan that he vaguely remembered Errichetti's and Norcross' names. (*See id.* at 3544–45.)

Errichetti testified before the Select Committee that Weinberg had given him the Sam Goody stereo advertisement on April 1, 1979, in the same meeting at which they had split the MacDonald bribe proceeds.[43] Errichetti stated that, after DiLorenzo had purchased the stereo, he and Weinberg had talked by telephone to arrange for its delivery. He said that he had had Weinberg give Dani Anise the sheik's name and address so that Errichetti could send a birthday letter that McKernan wrote, but that the letter ultimately had been hand-delivered to Weinberg with the gift.[44] Errichetti maintained that this gift, as with all gifts after the microwave oven, had been financed by Meiler through Dani Anise, even though Errichetti, by his own admission, had just received $37,500 from the MacDonald bribe. (*See* Sel Comm. Hrg., Sept. 15, 1982, at 231–33 (testimony of Angelo J. Errichetti).)

In her affidavit Marie Weinberg alleged that her husband had "brought home an entire stereo system, including two speakers and a wooden case with a glass magnetic door and two shelves" identified to her as gifts. (*See* Marie Weinberg Affidavit.) She alleged further that Mel Weinberg had given the stereo cabinet to John Good. (*See id.*) Weinberg denied having received a stereo from Errichetti or DiLorenzo. (*See Myers* Trial Tr. 2251–53; Sel. Comm. Hrg., Sept. 16, 1982, at 121–23 (testimony of Melvin C. Weinberg).) The Palm Beach County Sheriff's Office recovered from the Weinbergs' Tequesta home a Harman-Kardon receiver and two Genesis III speakers. (*See* Deaton Affidavit at 2.) Weinberg denied knowing the source of those components in his own home. (*See id.* at 3; Sel. Comm. Hrg., Sept. 16, 1982, at 123–26 (testimony of Melvin C. Weinberg).) The FBI learned from the Harman-Kardon Corporation that the model of stereo receiver found in Weinberg's home, the HK 560, had been discontinued after 1979 and that in 1979 it had been sold to many distributors, including the main branch of Hi-Fidelity House in Broomall, Pennsylvania, which had purchased approximately 100 of them. The manufacturer of the Genesis stereo speakers found in the Weinberg home has determined from their serial numbers that it sold those two speakers to Hi-Fidelity House pursuant to a January 23, 1979, order. (*See* Deaton Affidavit at 6.)

---

[43] DiLorenzo told the Select Committee, however, that Errichetti had returned to his automobile "empty-handed" after meeting Weinberg on April 1. The Errichetti-DiLorenzo story, however, gains credibility from the fact that *The New York Times Magazine* on April 1, 1979, did run an article featuring a photograph of a Pioneer stereo system available for sale in a stereo cabinet from Sam Goody for $3,434. (*See The New York Times Magazine*, Apr. 1, 1979, at 72–73.) It is possible that Errichetti had folded the page from the magazine and placed it in his pocket before returning to the car.

[44] McKernan apparently verified to Houlihan that he had written the letter. (*See* 128 Cong. Rec. S. 1482 (daily ed. Mar. 3, 1982).)

Hi-Fidelity House has determined that its Cherry Hill outlet sold two Genesis speakers, one Harman-Kardon HK 560 receiver, an Optonica tape cassette player,[45] head phones, tapes, and a stereo cabinet for $1,300 in cash on April 4, 1979. The FBI attempted to locate the purported purchaser, William Meyers, at the Phildelphia address listed on the sales receipt, but residents of that vicinity were unable to identify him.[46]

Based on Errichetti's and DiLorenzo's testimony, and Marie Weinberg's affidavit, the recovery of components from Weinberg's home in Tequesta, Weinberg's failure to explain the origin of these components, and the FBI's tracing of the likely purchase of the components to a site consistent with DiLorenzo's testimony, the Select Committee concludes that Weinberg solicited and received a stereo system in March or April of 1979.

(d) The television sets

DiLorenzo told Special Agent Houlihan on June 10, 1980, that he and George Norcross had purchased three small color televisions at a store in Cherry Hill, New Jersey, and that he had delivered the television sets to Weinberg at the Cherry Hill Hyatt House.[47] He said that Weinberg had instructed him to place them in his van without being seen. (*See* Martin F. Houlihan FD 302, June 10, 1980.)

At the *Myers* trial DiLorenzo testified that in the late summer of 1979 Errichetti had asked him to purchase three 22-inch Sony televisions for the sheik's Board of Directors, but that Errichetti had later told him to substitute 17-inch televisions, because the larger sets were too expensive. DiLorenzo testified that he had spent roughly $1,000 for the telvision sets, using cash he had obtained from Dani Anise, and that on a hot day he had delivered the sets to Weinberg at the Cherry Hill Hyatt House, where Weinberg was staying. DiLorenzo said that Amoroso and Brady also had been there, but that Weinberg had met him in the lobby, had given him the keys to his van, and had asked him to put the television sets in the van without mentioining anything to Amoroso or Brady. DiLorenzo testified that he had no receipt and could not be more specific about the date. (*See Myers* Trial Tr. 3078-81, 3098-100.) DiLorenzo told a consistent version of this episode to the Select Committee.[48]

---

[45] Although DiLorenzo never mentioned a cassette deck as one of the components of the stereo, journalist Indy Badhwar has stated in an affidavit that he observed and photographed in the Weinbergs' home on January 8, 1982, an Optonica cassette deck, along with the Harman-Kardon receiver and Genesis speakers. (*See* Badhwar Affidavit, *reprinted in* 128 Cong. Rec. S 1483 (daily ed. Mar. 3, 1982).) The FBI apparently never has attempted to trace the origin of the tape deck, presumably because DiLorenzo did not specifically itemize it.

[46] The FBI found in Evelyn Weinberg's Stuart, Florida, house a Marantz stereo receiver and two Sony speakers. Weinberg told the FBI that he had purchased the receiver at Frank's TV in Stuart, Florida, around 1975. He said that the speakers, along with other items, had been purchased in 1980 from the TV Center in Stuart. (*See* Deaton Affidavit at 2–3.) Frank's TV told the FBI that Weinberg had bought a Marantz receiver and two Marantz speakers on November 4, 1976. The TV Center informed the FBI that Weinberg had been a customer since 1980 and that Evelyn Weinberg had bought two Sony speakers on October 9, 1980. (*See id.* at 8.)

[47] On June 24, 1980, however, Norcross told the FBI that he had merely called the Hi Fi House, at DiLorenzo's request, to ascertain whether it carried 19-inch television sets; that the Hi Fi House had told him it carried 17-inch, but not 19-inch, sets; and that he had given that information to DiLorenzo. Norcross said he did not know whether DiLorenzo then had purchased any sets. This conflicts with DiLorenzo's contention that Norcross accompanied him when he bought the three sets. [Deleted] (The omission of a citation to a confidential document is identified by "[Deleted]." *See* pp. V–VI *supra.*)

Errichetti testified before the Select Committee that Weinberg had proposed in June 1979 that Errichetti purchase the television sets to curry favor with the sheik's directors, who were supposedly considering a loan to publisher and businessman Bob Guccione for a casino project. (*See* pages 306-12 *infra*). Errichetti's description of the delivery of the sets matched DiLorenzo's trial testimony almost exactly. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 234-35, 241-42 (testimony of Angelo J. Errichetti).)

Three 17-inch sony Trinitron television sets were found in the Weinbergs' home in Tequesta, Florida, in January 1982. The serial number plates of two of the sets had been removed. The FBI determined that all three sets had been assembled in California and had been shipped to a Sony distribution center in New Jersey in March 1979. (Of Sony's four other domestic distribution centers, one is in Miami, Florida, and three are in California or in the mid-west.) (*See* Deaton Affidavit at 2, 4-5.) [49]

Marie Weinberg's January 1982 affidavit stated that her husband had received the Sony television sets from a friend during the Abscam investigation. (*See* Marie Weinberg Affidavit.) Weinberg's son, J.R., told the Palm Beach County Sheriff's Office that the television sets had appeared in his home one day in the summer of 1979, shortly after his family had moved to Florida and that his mother had said that she had bought them. (*See* Deaton Affidavit at 9.)

---

[48] The government adduced evidence at the *Myers* trial demonstrating that Weinberg had sold his van in Florida on June 23, 1979, well before "late summer 1979," when DiLorenzo testified that he had placed the television sets in the van. (*See Myers* Trial Tr. 3514-21; *Myers* Gov't Trial Ex. 28.) Moreover, telephone toll records show that Weinberg was in Florida on June 18-22, 1979, and in other southern states on June 16-17. Thus, Weinberg and his van could not have been in Cherry Hill, New Jersey, after June 15, 1979. Therefore, DiLorenzo's statement that he placed the television in Weinberg's van in "late summer" in Cherry Hill was false.

DiLorenzo testified that he could not fix the exact date of the transaction, but he remembered that "[i]t was very hot outside." (*See Myers* Trial Tr. 3098-99.) Weather records for Philadelphia, ten miles from Cherry Hill, reveal that the temperature in June 1979 was significantly below normal for that month and location. The high temperature never exceeded 85° Fahrenheit and was on most days well below that. (*See* National Climatic Center, National Oceanic and Atmospheric Administration, Local Climatological Data, Monthly Summary, June 1979, Philadelphia, Pennsylvania.)

However, FBI officials told the Select Committee on December 10, 1982, that Weinberg, Amoroso, and Brady were at the Cherry Hill Hyatt on June 14-15, 1979, meeting with Errichetti and others involved in the titanium venture. Amoroso and Brady believe that Weinberg had his van with him in Cherry Hill on June 14 and June 15, because he was driving to Florida with many of his personal belongings. Moreover, June 14 and June 15 were entirely sunny days with temperatures in the low 80's Fahrenheit. (*See id.*) It appears likely that DiLorenzo had delivered the television sets on one of those dates and merely had erred in estimating the date of the transaction.

[49] The FBI also found three Sony Trinitron television sets (19-inch rathr than 17-inch) in Evelyn Weinberg's home in Stuart, Florida, (*See id.* at 2.) The FBI learned that the sets had been sold to Weinberg by a Stuart store on June 23 and August 22, 1980. (*See id.* at 8.) It is unclear whether Weinberg purchased those television sets in an attempt to conceal his receipt of the sets from Errichetti, but it seems unlikely, inasmuch as they are different models. (The purchases were, however, close in time to DiLorenzo's interview.) Another possibility is suggested by news accounts from around the time of Marie Weinberg's death that revealed that Weinberg had furnished Evelyn's home nearly identically to Marie's, including carpets and drapes—and possibly televisions. (*See, e.g., Jack Anderson's Washington Merry-Go-Round*, Feb. 2. 1982, *reprinted in* 128 Cong. Rec. S 1554 (daily ed. Mar. 3, 1982); Interview of Marie Weinberg by Indy Badhwar, *reprinted in* 128 Cong. Rec. S 1483, S 1495 (daily Ed. Mar. 3, 1982).)

Weinberg has consistently denied, before grand juries, in court proceedings, and before the Select Committee, that he solicited or received televisions from Errichetti or DiLorenzo. (*See* 128 Cong. Rec. S. 1507-08 (daily ed. Mar. 3, 1982); *Myers* Trial Tr. 2250; Sel. Comm. Hrg., Sept. 15, 1982, at 121-26 (testimony of Melvin C. Weinberg).)

The Select Committee has concluded that Weinberg did solicit and receive three Sony television sets from Errichetti. The testimony of Errichetti and DiLorenzo does not itself establish that fact, in view of Errichetti's lying on other issues before the Select Committee (*see* pages 135-36, 409 *infra*) and in view of DiLorenzo's bias, admitted lie on June 10, 1980, and other erroneous statements. However, their testimony is reinforced by the recovery from Weinberg's home of three television sets identical to those purchased by DiLorenzo and by Marie Weinberg's and J.R.'s statements concerning their appearance. The removal of serial number plates from two of the sets makes Weinberg's denials even more suspicious.[50] Finally, Weinberg's claim that he does not know the origin of three television sets in his own home cannot reasonably be believed.

5. The Katz Gifts

(a) The three wrist watches

Sometime in late June or early July 1979, George Katz gave Weinberg three expensive wrist watches.[51] On July 10, 1979, Weinberg turned the watches over to Amoroso and Good, who decided that Amoroso and Weinberg each would wear one to enhance their credibility.[52] Good retained the third watch at the FBI's Hauppauge Resident Agency as evidence. (*See* [Deleted]; *Myers* D.P. Tr. 2596-97; *Jannotti* Post-trial D.P. Tr. 2.38, 2.41-.42, 2.86-.87, 3.13.)

When he was interviewed on February 2, 1980, the day that the covert stage of Abscam ended, Katz told the FBI that Weinberg had solicited the watches from him "to shorten the way to the sheik." ([Deleted]) Weinberg, on the other hand, told Amoroso and Good in June or July 1979, and has since reiterated in testimony, that Katz had offered the watches unsolicited and that, although Weinberg at first had protested, he ultimately had accepted the watches to avoid offending Katz. (*See* [Deleted]; *Jannotti* Post-trial D.P. Tr. 2.31, 2.74-.75, 3.12.) Weinberg has maintained that he happened to mention to Katz that the Arabs enjoyed jewelry and that in response Katz stated without solicitation that he wanted to give wrist watches both to the sheiks and to Weinberg. (*See* [Deleted]; *Jannotti* Post-trial D.P. Tr. 2.31.)

---

[50] Marie Weinberg alleged that she observed Mel Weinberg removing the serial number plate from another piece of equipment, the microwave oven, that Weinberg received from Errichetti. (*See* pp. 116-17 (*supra*.)

[51] The watches were *Myers* Gov't Trial Ex. 27. Katz told the FBI that the watches were collectively valued at approximately $8,000. (*See Myers* D.P. Ex. 8.) Weinberg, on the other hand, testified that the watches were worth $18,000. (*See, e.g., Myers* Trial Tr. 2433.) Although the jeweler who sold Katz the watches corroborated Katz' estimate by testifying that Katz paid approximately $7,500 for the watches (*see Myers* D.P. Tr. 1180), the courts have inexplicably adopted Weinberg's erroneous figure, inflated by $10,000. *See, e.g., United States* v. *Myers,* 692 F.2d at 846.

[52] Amoroso told the Select Committee that he removed his watch from his wrist whenever he met Katz to avoid raising Katz' suspicions.

Katz' death in 1981 and Weinberg's mendacity make it impossible to determine with certainty whether Weinberg solicited the wrist watches or Katz volunteered them. Nevertheless, Weinberg's claim that his offhand remark on the Arabs' taste for jewelry prompted Katz to offer three expensive watches, including one for Weinberg, is farfetched. In light of the Select Committee's finding that Weinberg solicited gifts from Errichetti as presents for the sheik (*see* pages 114–23 *supra*), it concludes that Katz' similar, and inherently more believable, contention that Weinberg solicited the watches purportedly to please the sheik is probably accurate. Even if Katz' offer of watches was evoked by Weinberg's comment about the Arabs' fondness for jewelry, Weinberg's comment presumably was intended to evoke some gift of jewelry. This conclusion is butteressed by the demonstrable falsity of, and inconsistencies in, Weinberg's version of the circumstances surrounding Katz' promise and delivery of watches. (*See* pages 125–27 *infra*.)

Apart from the issue of whether the watches were solicited or volunteered, much attention in the trial and due process proceedings and in the district and appellate court briefs focused on the circumstances of the gift of watches. The government has sought to establish that Weinberg voluntarily and unilaterally relinquished to the FBI the watches, which were the most valuable gifts he has been alleged to have received. From this fact, the government has argued, it is incredible that Weinberg would have freely given to the government the valuable gifts he received, but would have secretly kept much less valuable gifts, such as a microwave oven and television sets. (*See Myers* Trial Tr. 3959.) Defendants have attempted to rebut this syllogism by trying to establish that the government knew in advance, independently of information conveyed to it by Weinberg, that Weinberg would be receiving or had received watches from Katz, and that, therefore, Weinberg had no choice but to tell the FBI about the watches and to relinquish them.[53]

The poor and conflicting memories of Amoroso, Good, and Weinberg and the vagueness of Amoroso's contemporaneous memorandum of Weinberg's explanation ([Deleted]) preclude the Select Committee from determining the precise circumstances of Weinberg's receipt of the watches. Amoroso's memorandum of July 10, 1979 ([Deleted]), states that on June 30, 1979, Weinberg told Amoroso that, at some unspecified prior date, in a conversation not specified as having been in person or by telephone, he had mentioned to Katz that two of the Abdul Enterprises board members were "jewelry freaks." Weinberg also told Amoroso that Katz subsequently had purchased three watches, two for members of the board and one for Weinberg, and had surprised Weinberg at some unspecified meeting by insisting that the watches be accepted. The memorandum also reports that on some unspecified date, Good and Amoroso decided that the watches should be worn.[54]

---

[53] A necessary, but unstated, part of the defendants' argument is the further condition that Weinberg must somehow have learned that the FBI had independently discovered that Katz would be giving, or had given, the watches to Weinberg.

The courts have adopted the parties' view of the significance of this factual question. The Second Circuit recently observed, for example, that "the Government's point remains that Weinberg was not likely to conceal a \$350 gift [the microwave oven] when he had been forthcoming about an \$18,000 gift." *United States* v. *Myers*, 692 F.2d at 846.

Amoroso testified that Weinberg had not told him when any of this had happened, except that Weinberg might have said that Katz had delivered the watches on June 30. Amoroso testified further that he had written the memorandum on July 10, when Weinberg had taken the watches to the Resident Agency. (*See Jannotti* Post-trial D.P. Tr. 3.7–.10.)

In contrast to this version of the events is Weinberg's testimony. Weinberg testified that he had informed Amoroso and Good when Katz had first promised the watches and that he subsequently had informed them when Katz had actually delivered the watches. (*See id.* at 2.32–.33, 2.38.) Weinberg testified that Katz had delivered the watches sometime between June 28 and June 30. (*See id.* at 2.33.)

Weinberg's version of the events, in addition to contradiciting Amoroso's version, also conflicts with the testimony of John Good. Good testified that, when Weinberg had first told him about the watches, Weinberg had indicated that he had not anticipated receiving the watches before the day he actually received them. (*See id.* at 2.74–.75.) Good further testified that Weinberg had not told him about the watches before Weinberg had informed him that Weinberg had received them from Katz. (*See id.* at 2.72–.73.) Amoroso also testified that he did not recall Weinberg's having told him in advance that Weinberg had expected to receive the watches. (*See id.* at 3.7–.11.)

Weinberg's testimony about the interval between the time that he received the watches and the time that he relinquished them to the FBI has varied. First, he testified that he had relinquished the watches to Good on the same day that he had received them. (*See Myers* Trial Tr. 2433.) Approximately one month later, he testified in another court proceeding that he had relinquished the watches to Good roughly a week after he had received them. (*See Jannotti* Post-trial D.P. Tr. 2.35.) Amoroso could not remember when he had first heard of the watches or when Weinberg had taken them to the Resident Agency. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.)

Although it is impossible to untangle this web of inconsistencies, it seems apparent that Weinberg's versions are untruthful. The jeweler from whom Katz purchased the watches testified in court and confirmed to the Select Committee that Katz made the purchase on June 19, 1979. (*See Myers* D.P. Tr. 1182.) Thus, the event—presumably Weinberg's solicitation—that motivated Katz' purchases must have occurred on or before June 19, 1979. Telephone toll records indicate that Weinberg telephoned Katz on June 19, 1979. Although there is a tape recording of the call, the tape does not include the beginning of the conversation. Because Weinberg did not make the call from a telephone that could be traced to him, telephone toll records do not reveal the length of the call. Weinberg may have solicited the watches in this, or in another unrecorded, and also untraced, conversation.

---

[54] Amoroso has testified that he dictated the memorandum at Good's instruction on July 10, 1979, and that it was typed the same day. (*See Jannotti* Post-trial D.P. Tr. 3.6–.9.) Defendants have alleged that the memorandum was either back-dated or inserted into the FBI files in September or October 1979, presumably by Amoroso and other agents. (*See Myers* Defendants-Appellants' Brief 25-26; *Criden* Appellate Brief 95; *Myers* Defendants' Post-Hearing Brief 60; *Myers* D.P. Tr. 2591-94, 2664-65.) The Select Committee has found no support for this extraordinary accusation that several FBI agents have conspired to obstruct justice in this matter. The defendants base their contention on the fact that Amoroso's memorandum is not in the proper numerical sequence in the FBI's files; but, in fact, the serial numbering of the files is by no means perfectly chronological, and there is nothing unusual about the sequence in which the memorandum appears. The absence of a perfectly chronological sequence arises from the number of operatives on the case, the frequent absence of operatives from the Hauppauge office, the delays in writing, dictating, transcribing, and proofreading, and simple disregard for careful recordkeeping procedures.

It seems likely that Weinberg received the watches from Katz sometime between June 27 and June 29, 1979. Travel and telephone toll records indicate that Weinberg was in the northeastern United States between June 25 and June 30, that he flew to Florida on June 30, and that he returned to New York on July 6 or 7. Weinberg and Katz both attended a meeting on June 27, 1979, in Arlington, Virginia. (*See* pages 231–32 *infra.*) Moreover, once on June 28 and twice on June 29, 1979, Weinberg initiated unrecorded telephone conversations with Katz.

Thus, regardless of exactly when Weinberg received the watches, it appears that the FBI did not know in advance that Weinberg was going to receive them and did not know that he had received them until he informed Amoroso that he had received them. The defendants nevertheless argue that Weinberg had to tell the FBI about the watches and to relinquish them and did not do so voluntarily. The exact argument is never clearly articulated, but could be any of three contentions: (1) the FBI independently learned that Katz would be giving Weinberg the watches, and Weinberg somehow learned that the FBI had discovered his impending receipt of the gifts; (2) the FBI independently learned that Katz had given Weinberg the watches, and Weinberg somehow learned that the FBI had discovered that Katz had given the gifts; or (3) circumstances occurred such that Weinberg *believed* that the FBI would learn that he was to receive or had received the watches. Under any of the three scenarios, Weinberg would have felt compelled to volunteer to the FBI his impending or actual receipt of the watches. In arguing that Weinberg did not voluntarily inform the FBI of the watches, the defendants rely in part on a tape recording of a conversation between Katz and Weinberg on July 14, 1979. (*See* [Deleted].) This is one of two recorded conversations between Katz and Weinberg that include references to the watches. Both conversations occurred after Weinberg had taken the watches to Good on July 10 and, therefore, have no bearing on the issue of the date of Weinberg's disclosure that the gifts were going to be or had been made. (The other conversation took place on July 17. (*See* [Deleted].)[55] Furthermore, even if the Amoroso memorandum was back-dated and Weinberg first informed the FBI of the watches after July 14, *Weinberg,* not Katz, raised the subject of the watches in the July 14 conversation. Defendants therefore err when they contend that "Katz mentioned the watches on a tape which Weinberg was required to transmit to his supervisors. Accordingly, he had no choice but to report the gifts at this point." (*Myers* Defendants-Appellants' Brief 25–26.)[56] It is inconceivable that Weinberg would have raised the issue of watches on the July 14 tape if he had been trying to keep the watches unknown to the FBI.

---

[55] Both of the conversations relate to Weinberg's returning to Katz for repair or replacement one of the watches, which apparently had a broken band. Although the subsequent exchange of watches, to which defendants devoted much attention in court and in their briefs, is curious, the Select Committee does not consider it relevant to any issue of import.

The conclusion that Weinberg relinquished the Katz watches to the FBI voluntarily while he clandestinely retained other less valuable gifts remains a conundrum. One possibility is that Weinberg considered the watches too valuable to keep and feared the potential repercussions if the FBI were to discover that he had solicited them; perhaps he had intended to solicit more reasonably priced wrist watches from Katz. Because Weinberg's solicitation and receipt of other gifts from Errichetti is clear, however, the resolution of the mystery of Weinberg's relinquishment of the watches from Katz is not critical.

(b) Liquor and Betamax video cassette recorder

In addition to making allegations on February 2, 1980, regarding the three wrist watches, Katz also told the FBI on that date that he had delivered to Weinberg a Sony Betamax video cassette recorder and $2,000 of liquor for Christmas in December 1979 to enhance his position with the sheik. (*See* [Deleted]) Katz told the FBI that Weinberg had requested that he not tell DeVito (Amoroso) of these gifts. (*See* [Deleted]) Weinberg denied under oath having received a Betamax from Katz. (*See Myers* D.P. Tr. 4400.) Weinberg's response on cross-examination to the accusation that Katz had given him liquor worth $2,000 was less categorical:

> Q: How about Katz, did you get any liquor from Katz?
> A: I testified before I believe Katz gave me two bottles of liquor around Christmastime.
> Q: They weren't thousand-dollar bottles, were they, Mel?
> A: I don't know. (*Id.*)[57]

The Palm Beach County Sheriff's Office found a Sony Betamax video cassette recorder in Weinberg's Tequesta home in early 1982.[58] The FBI learned from the Sony Corporation that the recorder had been manufactured in Japan on October 8, 1979. (*See* Deaton Affidavit at 2, 3.) Weinberg told the FBI that he did not know the source of the Betamax. (*See id.* at 3.) Weinberg's son informed the FBI that he had received the Betamax from his mother as a Christmas present in 1979. (*See id.* at 9.)

---

[56] As defendants discovered, the July 14 tape has a gap of 57 feet of blank tape, which interrupts the discussion of the watches. (*See* [Deleted]) Although the existence of this gap does not support defendants' claim that Weinberg was compelled to notify the FBI of the Katz' watches, it does suggest, if it resulted from a deliberate erasure by Weinberg, that Weinberg was attempting to conceal Katz' remarks, presumably about Weinberg's solicitation of the watches. (*See* pp. 92–93 *supra*.)

[57] Special Agent Brady testified that Weinberg had denied to him having received a large amount of liquor from Katz. (*See Myers* D.P. Tr. 3445.)

[58] Marie Weinberg stated in her affidavit that Mel Weinberg had telephoned her during an Abscam trial in 1980 and had asked her to hide a Betamax video recorder in a nearby condominium without being seen. (*See* Marie Weinberg Affidavit.) It is not clear whether Marie was using "Betamax" as a trade name or as a generic word.

The FBI also located a Sony Betamax recorder in the Stuart home of Mel and Evelyn Weinberg. (*See* Deaton Affidavit at 2.) The FBI identified this Betamax as having been purchased by Weinberg from a television store in Florida on August 22, 1980. (*See* [Deleted].) As with the television sets found in the Stuart home, it is unclear whether Weinberg purchased the Betamax to deceive the FBI or merely to duplicate his Tequesta home's furnishings. (*See* p. 122 n. 49 *supra*.)

The Select Committee concludes that Weinberg solicited and received a Betamax video cassette recorder from Katz in December 1979. Katz had no forewarning that he was to be interviewed by the FBI on February 2, 1980, and Abscam was not yet publicly known at that time. Nevertheless, without any prior mention by the FBI interviewer of gifts, Katz, in response to the FBI interviewer's question of whether he had made any "payments relative to the titanium mine," described the Betamax and liquor incidents. The existence of the Betamax in Weinberg's home and his son's description of when it appeared corroborate Katz' story. Weinberg's inherently implausible denial of any knowledge of how a Betamax video recorder came to be in his own home further suggests that he lied about the incident.

Although the Select Committee has not reached a firm conclusion about the truth of Katz' allegation about liquor, the accuracy of the balance of his February 2, 1980, statement about gifts—the watches and the Betamax—suggests that Weinberg also solicited and received a substantial amount of liquor from Katz in December 1979. Again, the circumstances under which Katz was interviewed on February 2, 1980, suggest that he did not concoct the gift allegation.

6. Other Gift Allegations

The evidentiary record regarding several other allegations of Weinberg's having solicited and received gifts and loans from suspects of the investigation is too sparse to support any factual conclusions by the Select Committee. Errichetti has alleged that he gave Weinberg, at Weinberg's suggestion, a $300 Seiko watch for the sheik in January 1979. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 235-36 (testimony of Angelo J. Errichetti).) Weinberg has denied the allegation. (*See Myers* Trial Tr. 2250.) Errichetti also has claimed that he delivered to Weinberg, at Weinberg's urging, an ounce of gold that he purchased in August of 1979 for $432 for the sheik. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 236-37 (testimony of Angelo J. Errichetti).) Weinberg has denied the allegation. (*See Myers* Trial Tr. 2250-51.) Errichetti has offered no corroboration for these allegations. Pursuant to a Select Committee subpoena, however, the First Peoples Bank of New Jersey has furnished the Select Committee with records documenting the sale of two half-ounce gold bars to Errichetti on September 18, 1979, for a total of $432.18. The bank employee who sold the gold that day has told the Select Committee that the gold was picked up by an individual who identified himself as being from Errichetti's office. The bank employee's description of the individual matches the physical characteristics of DiLorenzo. The Select Committee has been unable to determine what happened to the gold.

Finally, Errichetti alleged to the Select Committee that in October 1979 Weinberg had asked him for $5,000, purportedly to help DeVito pay gambling debts. Errichetti claimed that, pursuant to that request, he had sent DiLorenzo, accompanied by DiLorenzo's girlfriend, to deliver $3,000 to Weinberg at LaGuardia Airport on October 21, 1979. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 237-40 (testimony of Angelo J. Errichetti).) By October 1979, however, the Noto debacle (*see* pages 434-35 *infra*) had caused, by Errichetti's own admission, "a strained relationship" (*see* Sel. Comm. Hrg., Sept. 15, 1982, at 217 (testimony of Angelo J. Errichetti)) between Weinberg and him, and there were very few communications between the two men in the latter half of September and in early October. Errichetti's claim that in this atmosphere he would have furnished Weinberg with $3,000 seems implausible. Although DiLorenzo's girlfriend has corroborated Errichetti's claim that DiLorenzo delivered an envelope to Weinberg at LaGuardia Airport in the fall of 1979, she indicated ignorance of the envelope's contents. (*See Myers* Trial Tr. 3127-29.) The Select Committee has concluded that, if the meeting occurred, it is more likely that the envelope contained a kickback for Weinberg from Errichetti's share of the Murphy bribe. (*See* pages 151-52 *infra*.) DiLorenzo had never mentioned the meeting before being asked by the Select Committee on December 3, 1982. (*See, e.g., Myers* Trial Tr. 3121.)

William Rosenberg, a defendant in the Abscam prosecution of Representative Kelly, testified that Weinberg once had borrowed $1,500 from him for travel expenses and had never repaid the money. (*See Myers* D.P. Tr. 4288-89; Sel. Comm. Hrg., Sept. 9, 1982, at 49, 67 (testimony of William Rosenberg).) Rosenberg testified further that Weinberg had borrowed $300 from Rosenberg's associate, William Eden, in February 1979. (*See id.* at 67-68.) Eden told an FBI agent in January 1981 that Weinberg had borrowed $300 from him to travel to Florida in October 1978 and $250 to buy a television set in February 1979. (*See Myers* D.P. Tr. 2609-10.) Weinberg has denied all allegations that he ever solicited loans from suspects in Abscam. (*See id.* at 2604-07, 2613, 4368, 4401-02.)

There also have been allegations of gifts to Weinberg from Alfred Carpentier, a defendant in the *Alexandro* case, including a payment of $950, an anti-radar device, and toys. (*See, e.g., Alexandro* Def. Ex. E; *Myers* D.P. Tr. 4171-73.) Weinberg has testified that he merely cashed a $950 check for Carpentier, that Carpentier gave him the anti-radar equipment unsolicited, and that he, Weinberg, left it at Abdul Enterprises' offices. (*See Alexandro* Trial Tr. 499-508; *Myers* D.P. Tr. 4356-59, 4382-84, 4401.)

Finally, Tony Torcasio, an associate of Bob Guccione's (*see* pages 306-12 *infra*), has alleged that Weinberg unsuccessfully solicited gifts of television sets and gold watches from him. (*See Myers* D.P. Tr. 2600-07; 128 Cong. Rec. S 1482 (daily ed. Mar. 3, 1982).)

The Select Committee has reached no conclusions about the accuracy of the gift and loan allegations made against Weinberg by Rosenberg, Eden, Carpentier, and Torcasio. Although Weinberg's pattern of solicitation of gifts from Errichetti and Katz renders these allegations plausible, insufficient evidence exists to corroborate the statements of the other individuals, most of whom proved themselves unreliable during the course of the Abscam investigation and prosecutions.

B. ALLEGATIONS THAT WEINBERG SHARED IN BRIBE PAYMENTS TO ABSCAM SUSPECTS

Abscam defendant Angelo Errichetti alleges that he and Melvin Weinberg shared three of the bribes for which Errichetti was either the principal or the middleman: (1) the January 20, 1979, payment of $25,000 to Errichetti; (2) the March 31, 1979, payment of $100,000 to Errichetti in the presence of Kenneth N. MacDonald, Vice Chairman of the New Jersey Casino Control Commission; and (3) the August 22, 1979, payment of $50,000 to Representative Michael A. "Ozzie" Myers.[59] These allegations raise several concerns about Abscam specifically and about undercover operations generally.

The most serious of these concerns is that Abscam suspects may have been unjustly indicted, tried, and convicted. If Weinberg was resourceful enough to share in bribes, he also may have set up an innocent party with a middleman's help—by staging a meeting that appeared on videotape to be a bribe to that innocent third party, but that in reality was a payment only to the middleman—and then split the money with the middleman. The allegations also heighten a concern raised by other aspects of Abscam: that the FBI lacked control over Weinberg throughout the Abscam undercover operation and that the FBI's policies and procedures for supervising and controlling informants are inadequate in complex undercover operations. Moreover, the allegations, if true, would erode whatever credibility Weinberg had as a witness and would undermine the explanations the government and Weinberg offered for unrecorded telephone conversations, for gaps in tape recordings, and for unrecorded meetings between Weinberg and middlemen.

The Select Committee concludes that the weight of the evidence shows Weinberg to have shared in the proceeds of at least one bribe payment: the $100,000 payment to Errichetti in MacDonald's presence on March 31, 1979. This conclusion is based on (1) the evidence that Weinberg intentionally misled the FBI about his whereabouts on April 1, 1979, by falsifying a tape recording; (2) the tape of a meeting on March 31, after the MacDonald bribe, during which Weinberg and Errichetti agreed to meet the next day; and (3) the contents, and the unusual consistency, of the stories of Joseph DiLorenzo and Angelo Errichetti about the events of April 1, 1979.

The evidence on the allegation that Weinberg shared in the January 20, 1979, payoff to Errichetti is insufficient to enable the Select Committee to reach such a conclusion. That evidence consists entirely of the testimony and other statements of Errichetti and of his nephew DiLorenzo, and the Select Committee has concluded that it cannot rely on those uncorroborated statements. Errichetti's demonstrated willingness to lie under oath, coupled with the internal contradictions of his own testimony and with its inconsistencies with DiLorenzo's testimony, make it impossible to rely on his uncorroborated word for any conclusion. DiLorenzo's statements are similarly suspect because of his selectively vague memory, his demonstrated bias toward his uncle, and his admission that in at least one instance he intentionally withheld material information about an Abscam issue.

---

[59] The Select Committee also considered the testimony of Abscam middlemen Howard Criden and Ellis Cook regarding bribe-sharing by Weinberg. Cook testified that Criden had told him that Weinberg and DeVito (Special Agent Amoroso) were sharing in the payoffs to Congressmen (*see Lederer* Trial Tr. 663–64; *Thompson* Trial Tr. 1246, 1252), and Criden told the Select Committee that he understood from Errichetti that Weinberg was getting part of the money paid to Representatives Myers, Lederer, Thompson, and Murphy (Sel. Comm. Hrg., Sept. 14, 1982, at 29–34 (testimony of Howard L. Criden)).

As to the payments made at the payoff meetings with Representatives Myers, Lederer, Thompson, and Murphy, there is some evidence that leads the Select Committee to believe that it is likely—and consistent with Weinberg's behavior throughout Abscam as illustrated by the events of April 1, 1979—that Weinberg shared in at least one of those payments.

The Select Committee concludes, however, that Weinberg's sharing in one or more bribe payments did not cause any public official to agree to perform any corrupt act that would not have been performed had Weinberg not received any part of the payment.[60] Some of the Abscam defendants who were tried and convicted might not have received as large a share of the payoffs as they were expecting, but the Select Committee finds no persuasive evidence that those officials were set up by Weinberg and a middleman.[61] The most troublesome incident was that involving Kenneth MacDonald—the one case as to which the Select Committee has concluded that Weinberg shared in a payment. Even in that case, however, where there is some doubt that MacDonald himself ever received any of the cash transferred in his presence, the Select Committee concludes that he was at least a willing participant in an illegal payment made to Errichetti because of MacDonald's presence and public office.[62]

The Select Committee finds that the government's monitoring, supervision, and control of Weinberg were lax, as exhibited by the government's ignorance that Weinberg was secretly meeting with middlemen, sharing in bribes, and falsifying taped conversations to confuse the FBI about his actions. Weinberg avoided detection when he shared in the MacDonald bribe, manipulated the evidence so as to convince the FBI over a year later that he had done nothing wrong, and thereby enriched himself with government funds that he was supposed to have helped the FBI use to ensnare corrupt public officials.

1. The January 20, 1979, Payment to Errichetti

The sole evidence that Weinberg shared in the payment of $25,000 to Errichetti on January 20, 1979, consists of the uncorroborated, inconsistent, and often incoherent allegations of Errichetti and DiLorenzo. DiLorenzo first made such an allegation on June 10, 1980, in an interview in Trenton, New Jersey, with Special Agent Martin F. Houlihan of the FBI's Newark Field Office and with Assistant United States Attorneys Edward J. Plaza and Robert A. Weir, Jr. The subject of the interview had been scheduled to be DiLorenzo's knowledge of the MacDonald transaction, but DiLorenzo volunteered information on gifts and other payments he had made to Weinberg in 1979.[63]

---

[60] The Select Committee does conclude that at least one unknowing, entirely innocent person, Senator Larry Pressler, appeared before the FBI's cameras because he had been led by a middleman to believe that he would be attending a legitimate meeting to discuss a campaign contribution. No such incident, however, resulted from Weinberg's having arranged to share with a middleman a bribe payment that Weinberg expected to be made at the meeting. These incidents occurred because the FBI's reliance on the uncorroborated statements of the untrustworthy middlemen that suspects would take a bribe was misplaced. *See* pp. 68–77 *supra*.

[61] *See* pp. 262–85 *infra*. The Select Committee's conclusion is not a judgment on whether the convictions should be upheld or on whether Weinberg's or the FBI's actions constituted due process outrageousness, as determined by the Supreme Court.

[62] *See* pp. 241–62 *infra*.

DiLorenzo told Houlihan that he had chauffeured Errichetti to New York on January 19, 1979, for a business trip and then had driven Errichetti to a Holiday Inn on Long Island. DiLorenzo said that Errichetti had met Weinberg at the Holiday Inn and that during the meeting he, DiLorenzo, placed a gift from Errichetti into Weinberg's van. (Martin F. Houlihan FD 302, June 10, 1980.)[64] Neither Houlihan's report of the June 1980 interview nor DiLorenzo's trial testimony in *Myers* in August 1980 mentions the length of the meeting between Errichetti and Weinberg or states whether Weinberg dined with Errichetti and DiLorenzo or with either of them. DiLorenzo told the Select Committee on September 10, 1982, that he could not remember whether Weinberg had dinner with him or with his uncle and that he also could not remember whether Weinberg had stayed at the Holiday Inn on the night of January 19. (Sel. Comm. interview of Joseph DiLorenzo, Sept. 10, 1982).)

Errichetti's version of the events of January 19, 1979, differs from DiLorenzo's. Errichetti testified before the Select Committee that he had met Weinberg at a Holiday Inn on Long Island on January 19 and that he had had dinner with Weinberg and DiLorenzo. (Sel. Comm. Hrg., Sept. 15, 1982, at 61 (testimony of Angelo J. Errichetti).) Unlike DiLorenzo, Errichetti did not mention any gift in connection with January 19.[65] Errichetti said that after dinner he had gone to his room with Weinberg to plan for the meeting scheduled with McCloud on the next day and to arrange for how Weinberg would later share in the payment. (*Id.* at 61, 66.) He did not mention where DiLorenzo had been during that meeting.

Weinberg's account differs from both Errichetti's and DiLorenzo's. Weinberg testified before the Select Committee that he had met Errichetti for 15 minutes in the lobby of the Holiday Inn at eight or nine o'clock without ever having gone to Errichetti's room or having had dinner. He said that Errichetti had then asked him whether Jack McCloud (Special Agent McCarthy) had the money for the meeting the next day and whether there would be any "hitches." Weinberg denied ever having told Errichetti what to say to McCloud or having agreed to split the money. (Sel. Comm. Hrg., Sept. 16, 1982, at 59-61 (testimony of Melvin C. Weinberg).)

Errichetti and Weinberg agree that Weinberg did not register for a room at the Holiday Inn.[66] They disagree, however, over the manner in which Errichetti registered and whether Weinberg instructed him on how to do so. Errichetti claims that Weinberg told him not to register under his own name, that he therefore registered under the name William Eden,[67] taking a room with two beds in which both he and DiLorenzo stayed, and that he prepaid in cash for one night in the room. (Sel. Comm. Hrg., Sept. 15, 1982, at 68–69 (testimony of Angelo J. Errichetti).) Weinberg claims that he met with Errichetti in the lobby as the latter was checking in, but that it was Errichetti who did not want to use a credit card. (Sel. Comm. Hrg., Sept. 16, 1982, at 56 (testimony of Melvin C. Weinberg).)

---

[63] DiLorenzo testified at the *Myers* trial on August 26, 1980, but he was not asked about the January 20, 1979, payment he had told the FBI had been made to Weinberg. Presumably, the *Myers* defendants did not raise the issue, because it would have exposed Errichetti's earlier bribe-taking. The prosecution, of course, had no incentive to discredit Weinberg.

[64] The Select Committee concludes that DiLorenzo did deliver a microwave oven to Weinberg on or about January 19, 1979, even though the Houlihan 302 says that the gift was a "betamax." (*See* pp. 115-17 *supra.*) Although the Houlihan 302 does not specify where in Long Island the Holiday Inn was located, DiLorenzo testified that he thought the hotel was near Exit 55 of the Long Island Expressway. (*Myers* Trial Tr. 3068.) The Hauppauge Holiday Inn is situated near that exit.

[65] Much later in his testimony before the Select Committee, Errichetti raised the matter of the gift of the microwave oven. Again, however, he did not in any way connect that transaction to the January 19 meeting. (Sel. Comm. Hrg., Sept. 15, 1982, at 229 (testimony of Angelo J. Errichetti).) *See* pp. 115-17 *supra.*

[66] DiLorenzo could not remember in his interview by the Select Committee whether Weinberg had stayed at the Holiday Inn on the night of January 19, but Houlihan's report of the DiLorenzo interview on June 10, 1980, indicates that DiLorenzo had said that he might have left the money in Weinberg's room on the next day.

Pursuant to a Select Committee subpoena, the Hauppauge Holiday Inn provided to the Select Committee records showing that a telephone call was made from Room 202 to Errichetti's number at the City of Camden Courthouse at 8:02 p.m. on January 19, 1979. There are no credit card records for Room 202 on that date, meaning that whoever registered for that room prepaid for it in cash. Unfortunately, the Holiday Inn's records are incomplete for January 1979, and there is no registration card indicating the name under which the room was registered or the time at which the occupant checked in or checked out.

The Select Committee concludes that Errichetti and DiLorenzo did stay at the Hauppauge Holiday Inn on Janury 19 and that Errichetti prepaid in cash. The Select Committee can come to no conclusion, however, as to the veracity of the rest of Errichetti's version of the events of that date.

The Select Committee concludes that Weinberg and Errichetti met at the Hauppauge Holiday Inn on January 19, but it cannot determine what was said or when the meeting occurred. The telephone records in the possession of the FBI indicate that a call charged to one of Weinberg's Florida telephone numbers and lasting for three minutes was made from the Hauppauge Holiday Inn at 5:59 to Errichetti's secretary's telephone in the Camden City Hall. As explained at page 109 *supra,* the FBI's records unfortunately fail to reflect whether many calls were a.m. or p.m. The Select Committee concludes, however, that it is extremely unlikely that the call described above was made at six o'clock in the morning. The Holiday Inn was unable to locate a record of this call, but was able to state that it must have been made from one of the hotel's telephones—either a desk telephone or a room telephone. It was not made from a pay telephone. The Select Committee concludes that it is likely that Weinberg and Errichetti met in Room 202 at 6:00 p.m. and that Weinberg's contrary testimony is erroneous.

The Select Committee further concludes that Weinberg did not inform the FBI of the meeting when it occurred and that he lied to the FBI in 1980 when he was questioned about the meeting. Weinberg testified before the Select Committee that he had told McCarthy that Errichetti was staying at the Holiday Inn, but had not said that he had met with him. (Sel. Comm. Hrg., Sept. 16, 1982, at 56 (testimony of Melvin C. Weinberg).) Special Agent McCarthy told the Select Committee that, although he was aware that Weinberg and Errichetti met on January 19, 1979, he had not been aware of that fact during Abscam's covert stage. (Sel. Comm. interview of John M. McCarthy, Sept. 2, 1982).) Documents in the files of the Department of Justice indicate that it was not until 1980 that Weinberg admitted having met Errichetti on January 19, 1979. When first confronted by agents investigating DiLorenzo's allegations, Weinberg denied having met with either Errichetti or DiLorenzo prior to Errichetti's January 20 meeting with McCloud (McCarthy). Only after having been shown telephone records proving that he had made a call from the Hauppauge Holiday Inn on January 19, 1979,[68] did Weinberg admit that the meeting had occurred.

---

[67] Errichetti said that Weinberg had not instructed him to use this or any other name. Errichetti merely had chosen the name of the man who had introduced him to Abdul Enterprises.

Errichetti met with McCloud on January 20, 1979, at approximately 10:00 a.m. and received a large envelope containing two smaller envelopes, each holding $12,500.[69] During the half-hour meeting, he never mentioned to McCloud that he had met with Weinberg on the previous evening. According to Errichetti's testimony before the Select Committee, Weinberg told him during the meeting on the 19th that he, Weinberg, was supposed to have been in Florida and warned Errichetti not to tell McCloud otherwise. (Sel. Comm. Hrg., Sept. 15, 1982, at 62 (testimony of Angelo J. Errichetti).) Telephone records indicate, however, that Weinberg was in the New York area from January 11, 1979, through January 20. Also, when Errichetti asked about Weinberg, McCloud told him he was *on his way* to Florida. Further, it is the collective recollection of Special Agents Good, McCarthy, Brady, Coughlin, Distler, and Kazcmarek that Weinberg spent part of the morning with them at the Hauppauge Resident Agency on January 20, 1979.

Errichetti testified that when he left McCloud's office with the unopened envelope in his hand, he gave it to DiLorenzo, who was waiting in the outer office, and went with DiLorenzo to their car. (Sel. Comm. Hrg., Sept. 15, 1982, at 63 (testimony of Angelo J. Errichetti).) DiLorenzo told the FBI on June 10, 1980, that he did not remember Errichetti's having handed him anything when Errichetti left the inner office nor Errichetti's having had a package. (Martin F. Houlihan FD 302, June 10, 1980.)

Errichetti told the Select Committee that he and DiLorenzo then had driven back to the Holiday Inn, with the envelope supposedly lying unopened between DiLorenzo and him. Once they had arrived at the Holiday Inn, Errichetti, allegedly following the instructions Weinberg had given him the night before, told DiLorenzo to take the envelope to their room and to place it underneath the mattress, between the mattress and the bedspring. He did not specify the bed under which DiLorenzo was to place the envelope. (Sel. Comm. Hrg., Sept. 15, 1982, at 63-67 (testimony of Angelo J. Errichetti).)[70]

---

[68] This is but one of several times when Weinberg either deceived or misled the FBI and had unrecorded conversations with suspects. *See* pp. 85–87 *supra*.

Weinberg claims that he never actually denied having met Errichetti on January 19. He says that when he was questioned about the meeting in 1980, he did not remember it, but that he himself then suggested checking his telephone records. (Sel. Comm. Hrg., Sept. 16, 1982, at 56–60 (testimony of Melvin C. Weinberg).) The Select Committee finds Weinberg's uncorroborated version of events to be erroneous.

[69] Special Agent McCarthy told the Select Committee that he placed the money into two small envelopes because it made a neater package. (Sel. Comm. interview of John M. McCarthy, Sept. 2, 1982.)

DiLorenzo's story conflicts with Errichetti's, is unbelievably vague, and has not remained consistent. At his June 10, 1980, FBI interview, DiLorenzo said that after he had driven Errichetti back to the Holiday Inn, Errichetti had given him a manila envelope to deliver to Weinberg. He could not remember, however, whether he had then handed the envelope to Weinberg or merely had placed it in Weinberg's room. (Martin F. Houlihan FD 302, June 10, 1980.)[71] On September 10, 1982, DiLorenzo told the Select Committee that he must have left the package for Weinberg in a room at the Holiday Inn, because he did not remember having seen Weinberg on January 20. DiLorenzo also no longer remembered anything about the package—its color, its size, its shape, or when or where he first saw it. He also did not remember having placed it under a mattress. (Sel. Comm. interview of Joseph DiLorenzo, Sept. 10, 1982.)

The Select Committee finds it highly unlikely that, approximately one year after the event, anyone would forget having put an unidentified mysterious package under a bed in a hotel room. The Select Committee also finds it highly unlikely that anyone would firmly remember having delivered a package on a particular date at a particular place after a specific series of events, but would forget whether it had been handed to someone or had been left in an abandoned room. The Select Committee concludes, therefore, that DiLorenzo has lied on this matter to protect his uncle; he did not in fact deliver a package to Weinberg on January 20, 1979, but does not want to contradict Errichetti's story.

Further, Errichetti's and DiLorenzo's stories are so vague and illogical that the Select Committee concludes that Weinberg probably did not share in any of the money paid to Errichetti by McCarthy on January 20, 1979. For example, although there is no doubt that Errichetti first went to Abdul Enterprises on December 1, 1978, for the express purpose of arranging for a bribe for himself and for others, and although the tapes and other documents show that Errichetti negotiated the amount and conditions of the payment, Errichetti claims that he never looked into the envelope on January 20 and had no personal knowledge of how much money he had been given. (Sel. Comm. Hrg., Sept. 15, 1982, at 63-64 (testimony of Angelo J. Errichetti).)[72] Equally incredibly, he claimed that he gave the entire $25,000 to Weinberg to place into an escrow account for use by DeVito, Weinberg, and Errichetti when Errichetti retired from politics and the three went into business together. (*Id.* at 64-65.)

---

[70] The Holiday Inn in Hauppauge has confirmed that Room 202, in which the Select Committee concludes Errichetti and DiLorenzo stayed, had two beds. It has also stated that only one key per room is given, absent a specific request for more, and that checkout was required to be by noon.

[71] As explained at pp. 132-33 *supra* both Weinberg and Errichetti have testified, in a rare show of agreement, that Weinberg did *not* have a room at the Holiday Inn. In addition, the Hauppauge Holiday Inn has no record that Weinberg stayed at the hotel.

[72] During the January 20 meeting, when McCloud offered Errichetti the chance to count the money, he declined to do so. ([Deleted]) (The omission of a citation to a confidential document is identified by "[Deleted]". *See* pp. V-VI *supra.*) The Select Committee sees a vast difference between a corrupt public official's likely behavior during a bribe session and his likely behavior in private after he has received the money.

The Select Committee does not believe that, without having made elaborate contingency plans, Errichetti would have left an envelope containing $25,000 in cash in a room that he was no longer occupying. According to Errichetti, he and Weinberg did not discuss under which bed the money was to be placed, nor what to do if a chambermaid got there first, even though checkout time at the hotel was shortly after the package allegedly was to be left in the room. The Select Committee also refuses to believe that Errichetti would have run the risk of accepting an illegal payment of $25,000 and then immediately have given the full amount to a man he had known for less than six weeks and had met in person only twice. The Select Committee disbelieves the contention that Errichetti would have trusted Weinberg, who, according to Errichetti's own version of events, was deceiving his employer, to place the money in an unidentified escrow account in an unidentified bank in an unidentified person's name for an unspecified period of time. The Select Committee also does not believe that Weinberg would have created the escrow scenario to include DeVito, as Errichetti avers, because Weinberg and Amoroso did not even meet until January 8, 1979, and the risk that Errichetti would mention the escrow to DeVito and would thereby reveal the alleged fraud would have been too great. Moreover, Errichetti never claimed that he was supposed to keep quiet about the $25,000; but, in hundreds of recorded conversations in which only he and his alleged partners—Weinberg and DeVito—participated, he never subsequently mentioned the supposed escrow account.

Even though the Select Committee concludes that Errichetti and DiLorenzo have lied about what happened, Weinberg's whereabouts at various times on January 20 remain unclear. Weinberg claims to have been in the outer office at Abdul Enterprises during the bribe meeting on January 20, although he could not remember when it took place. He also claims that after the meeting, he and the FBI agents spent some time preparing the tapes and that he then drove his pickup truck to the FBI Hauppauge Resident Agency where he "spent most of the day until [he] went home." (Sel. Comm. Hrg., Sept. 16, 1982, at 62-63 (testimony of Melvin C. Weinberg).)

During the January 20 meeting, Errichetti told McCloud (Special Agent McCarthy) that he was very impressed with Mel, and wanted to deal directly with him. McCloud told Errichetti that Weinberg would be in Florida until the first of February, and, in fact, was on his way to the airport to fly to Florida as they spoke. ([Deleted]) It is unlikely therefore, that Weinberg was sitting in the outer office as he claims during this conversation. Also DiLorenzo, who, according to undisputed testimony, *was* in the outer office, does not remember having seen him there. Special Agent McCarthy told the Select Committee that he cannot remember whether he saw Weinberg on January 20. McCarthy also could not remember why he told Errichetti that Weinberg was on his way to the airport and does not recall if he actually knew that to be true. FBI officials told the Select Committee on December 2, 1982, that it is the collective recollection of Special Agents Good, McCarthy, Brady, Coughlin, Distler, and Kazcmarek that Weinberg went to the Resident Agency for about one-hour after the videotaped Errichetti meeting.

Telephone records show that Weinberg was in New York in the early afternoon on January 20 and in Florida in the evening. At 12:36 Weinberg made a one-minute call to West Palm Beach, Florida, from an unidentified number in Queens, New York,[73] and charged the call to one of his Florida telephone numbers. An hour later three more calls from a telephone at LaGuardia Airport were charged to Weinberg's Florida number.[74] At 8:27 p.m. Weinberg placed a call to his home in Long Island from Florida and charged the call to one of his Florida telephones.

The Select Committee asked the FBI to try to determine when and how Weinberg went to Florida. After searching its files for both Abscam and Goldcon, the FBI was unable to find any record showing what flight Weinberg took or showing any other Weinberg travel expense for January 20, 1979.[75] The telephone records suggest that his flight must have been in the afternoon sometime after 1:45 p.m.

Since the Select Committee has concluded it cannot rely on Weinberg's uncorroborated statements for the truth on any issue, Weinberg's location at various times on January 20, 1979, is uncertain, with the possible exception of the one-hour period from 10:30 a.m. to 11:30 a.m. The bribe meeting started at about 10:00 a.m. and lasted approximately 30 minutes. The collective recollection (always a doubtful method for determining facts) of several agents suggests that Weinberg was with those agents until 11:30 a.m. Weinberg was in Queens at 12:36 in the afternoon. Assuming it took him an hour to get from Hauppauge to Queens, he still would have been able to meet with Errichetti or DiLorenzo after Errichetti's meeting with McCloud and to be in Queens at 12:30 p.m.

The Select Committee cannot, therefore, definitively reject the possibility that Weinberg met with Errichetti, in some fashion other than that alleged by Errichetti, and obtained some share, but not all, of Errichetti's payment.[76] The Select Committee does find, however, that there is insufficient evidence to warrant a conclusion that Weinbert did meet Errichetti or DiLorenzo on January 20 or that Weinberg did share in the $25,000 payment made to Errichetti that date.

---

[73] The telephone records show that the call came from one of three exchanges, but the records do not identify from which one, or what the final four digits of the numbers were.

[74] At 1:29, Weinberg made a two-minute call to a number in Central Islip, New York; at 1:31 he made a six-minute call to Lynbrook, New York; and at 1:37 he called another one of his Florida numbers in a conversation lasting seven minutes.

[75] The Select Committee finds it difficult to believe that Weinberg would have flown to Florida without having been reimbursed. Irrespective of whether he sought reimbursement, however, careful monitoring of an informant on probation should require some knowledge of what state he is in at what time. The FBI's failure to keep any record of Weinberg's interstate travels on January 20 is another example of deficient recordkeeping. (*See* pp. 83–111 *supra.*)

[76] Marie Weinberg alleged that sometime between "late 1978 and early 1978 [sic]" she drove Weinberg to a meeting at the Hauppauge Holiday Inn, during which Weinberg met Errichetti along the road and returned with a briefcase. (Marie Weinberg Affidavit) While this is some evidence that Weinberg shared in the January 20 Errichetti bribe, the Select Committee concludes that it cannot accord great weight to her allegations. Her affidavit was written shortly before her suicide, when she was under tremendous strain; she was never subjected to cross-examination; she had become bitter about her husband's extramarital relationship with Evelyn (Knight) Weinberg; her description of the event alleged in her affidavit is too vague to refer clearly to the January 20 event; she referred to a briefcase, while the January 20 payment to Errichetti was made in an envelope; and she said that Weinberg had patted the briefcase and had said, "Forty-five," but Errichetti was paid only $25,000. Moreover, neither Errichetti nor DiLorenzo has ever stated that she was with Weinberg at any time on January 19 or January 20, and neither Errichetti nor DiLorenzo has ever stated that either of them had a briefcase on either of those dates.

2. The March 31, 1979, MacDonald Payment

The Select Committee concludes that in the early afternoon of April 1, 1979, Weinberg met Errichetti and DiLorenzo at a rest stop near Exit 52 or 53 of the Long Island Expressway and received a portion of the $100,000 paid to Errichetti on the previous day in the presence of Kenneth MacDonald, Vice Chairman of the Casino Control Commission. The Select Committee further concludes that Weinberg made the final arrangements for the payoff in an unrecorded meeting with Mayor Errichetti on March 30, 1979, and that he deliberately created a false exculpatory record that misled the FBI for almost two years.

When DiLorenzo first raised this bribe-sharing allegation in his FBI interview on June 10, 1980, the FBI relied on a tape that purported to be a recording of a conversation between Errichetti and Weinberg at 2:30 p.m. on April 1, 1979, to conclude that DiLorenzo was lying. It was not until Reid Weingarten, an attorney in the Public Integrity Section of the Department of Justice, subpoenaed telephone records during the grand jury investigation of the MacDonald case in December 1980 that the Department of Justice learned that there had been no conversation at 2:30 p.m. on April 1, 1979. FBI laboratory investigation of the April 1 tape in February 1981 revealed that Weinberg's recorded preamble to the April 1 conversation, which had deceived the FBI, had been recorded separately from the conversation. The Select Committee concludes that Weinberg recorded the preamble to give himself an alibi for the period in which he was actually receiving from Errichetti a kickback of a portion of the $100,000 paid to Errichetti in MacDonald's presence on March 31, 1979.

Before the March 31 videotaped bribe meeting, Errichetti regularly had been claiming in recorded conversations that he "controlled" MacDonald, and a bribe payment to MacDonald through Errichetti as his "bag guy" to ensure a casino license for Abdul Enterprises' casino had been discussed for some months. Errichetti had claimed to prefer, however, to insulate MacDonald by taking the money out of his presence. The FBI, acting through Special Agent John McCarthy, who posed as Abdul Enterprises' Chairman of the Board Jack McCloud, would not accept that course of action. The FBI wanted more active participation from MacDonald. On March 23, 1979, after the party on the FBI's yacht in Florida, Errichetti and McCloud agreed that MacDonald would accompany Errichetti to Abdul Enterprises, but would remain in the car while Errichetti received the money from McCloud. Errichetti would then give the money to MacDonald in the parking lot, with McCloud watching from the window in his own office. ([Deleted])[77] The scenario worked out between Errichetti and McCloud on March 23 was unacceptable to Department of Justice attorneys and to ranking FBI officials. They wanted to ensure that MacDonald personally acknowledged receipt of the money.

---

[77] The explanation of the alleged April 1, 1979, bribe-sharing requires some discussion of the MacDonald transaction. In this section of the report, however, the discussion is generally limited to those aspects of the transaction leading to the conclusion that Weinberg received some of the money paid to Errichetti in MacDonald's presence on March 31, 1979. In pp. 241-262 of this report *infra*, the Select Committe discusses and rejects the contention that MacDonald had no idea that the March 31 payment of $100,000 was being made because of his presence, his public office, and representations as to his willingness to use his public office to help Abdul Enterprises.

Weinberg remained in Florida after the party on March 23, but he was in constant contact with Errichetti. He called Errichetti's numbers in Camden at least once on March 26, at least once on March 27, at least twice on March 28, and at least three times on March 29. Two of these were recorded, and seven are reflected in telephone toll records. In the one conversation recorded on March 29, Errichetti and Weinberg agreed to meet on the next day at 12:15 p.m. ([Deleted])

According to Weinberg's testimony before the Select Committee (Sel. Comm. Hrg., Sept. 16, 1982, at 77–79 (testimony of Melvin C. Weinberg)), which was consistent with what Good had told the Select Committee in July 1982 (Sel. Comm. interview of John Good, July 13, 1982), the FBI told Weinberg to contact Errichetti to clarify the MacDonald scenario. Weinberg arranged, therefore, to have Errichetti pick him up at the airport and drive him to the Hauppauge Holiday Inn.[78] The meeting was unrecorded because, according to FBI officials, the FBI was unable to provide Weinberg with a Nagra tape recorder before Errichetti arrived at the airport.[79]

Abscam prosecutor Thomas Puccio testified that he learned on March 30, 1979, that Errichetti was meeting Weinberg at the airport. He knew that the meeting would not be recorded, but he was not concerned; he knew that if Weinberg wanted to meet Errichetti in secret he could. (Sel. Comm. Hrg., July 27, 1982, at 140–41 (testimony of Thomas Puccio).) Former Brooklyn Strike Force Attorney John Jacobs told the Select Committee that he and fellow Strike Force Attorney Lawrence Sharf had spent several hours with Weinberg before the March 30 meeting preparing him. Jacobs said he was not surprised when he discovered that the meeting had not been recorded. (Sel. Comm. interview of John Jacobs, July 23, 1982.) No explanation has been given as to why Jacobs and Sharf could not have given Weinberg the Nagra recorder.

Special Agent Amoroso told the Select Committee that he learned of the unrecorded March 30 meeting by March 31.[80] He did not debrief Weinberg about the meeting or memorialize it, because he was "not involved with the MacDonald payoff." (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) Special Agent McCarthy said he knew nothing about the March 30 meeting except what he learned about it during the Abscam trials. (Sel. Comm. interview of John M. McCarthy, Sept. 2, 1982.)

---

[78] Errichetti claims that the meeting lasted a long time, possibly four and a half hours. Weinberg, to the contrary, said it lasted merely as long as it takes to drive to Hauppauge from John F. Kennedy International Airport, possibly one hour. Absent evidence corroborating either story, the Select Committee can make no judgment as to the actual length of the meeting.

In any event, the Select Committee is confused by this scenario. Weinberg maintained a home in Hauppauge, a fact that Errichetti knew. Weinberg did not explain why Errichetti was not surprised that Weinberg wanted to stay in a hotel a few miles from his house.

[79] Weinberg used a Lanier tape recorder to record telephone calls. That recorder, however, was bulkier than a Nagra. Accordingly, during face-to-face meetings an FBI Nagra was ordinarily used. Special Agent Amoroso usually had control of the Nagra. In some situations, Weinberg was provided a Nagra, but only for specific meetings.

[80] Amoroso was in Florida on March 29, when he was told to fly to New York to meet with MacDonald, Errichetti, and Weinburg after the bribe meeting. He flew to Washington, D.C., first and arrived in Hauppauge between three and four p.m. on March 30.

Because there is no recording of the March 30 meeting, and because no FD 302 report was prepared of any debriefing of Weinberg, the Select Committee cannot determine what was discussed, other than that Errichetti provided Weinberg with a handwritten list of potentially corrupt public officials, including two United States Congressmen.[81]

The Select Committee questions the wisdom of allowing Weinberg to meet with an Abscam suspect one day before an important bribe meeting without any supervision and without providing him any equipment with which to record. The FBI's laxity is compounded by the inexplicable failure to memorialize the debriefing of Weinberg, given the importance of the handwritten list, and given that the FBI arranged the meeting.[82]

Errichetti claims that he and Weinberg spent the meeting on March 30 planning the MacDonald scenario and the division of the $100,000. (Sel. Comm. Hrg., Sept. 15, 1982, at 134–36 (testimony of Angelo J. Errichetti). Weinberg claims that he told Errichetti that MacDonald would have to appear in person and acknowledge the payoff; he denied all of Errichetti's allegations about bribe-sharing. (Sel. Comm. Hrg., Sept. 16, 1982, at 78 (testimony of Melvin C. Weinberg).)[83]

The Select Committee concludes that during their meeting on March 30, it is likely that Weinberg and Errichetti made their final arrangements to meet on April 1. The Select Committee recognizes that it would have been impossible to have prevented Weinberg from arranging to contact Errichetti in some way—such as by calling on a pay-telephone—without the FBI's knowledge. The Select Committee concludes, however, that in Abscam the FBI made it too easy for Weinberg to operate according to his own agenda, especially given his prior history of having engaged in illegal activities while serving as an FBI informant.

On Saturday, March 31, 1979, DiLorenzo drove MacDonald and Errichetti to the Abdul Enterprises offices in Long Island. Errichetti and MacDonald met with McCloud, who in MacDonald's presence gave Errichetti a briefcase containing $100,000.[84] After having left the Abdul Enterprises offices, DiLorenzo, Errichetti, and MacDonald drove to the Hauppauge Holiday Inn, where they met DeVito (Special Agent Amoroso) and Weinberg.

Two simultaneous recordings of the post-bribe luncheon meeting at the Holiday Inn were made: Amoroso had a Nagra tape recorder concealed in his briefcase, and Weinberg was wearing a Nagra concealed on his body.[85] According to the FBI, Weinberg's recorder malfunctioned and recorded only the final 15 minutes of a 45-minute meeting. The tapes, both of which the Select Committee has heard, are of poor audio quality. The meeting took place in a public restaurant; five persons were present; and there is substantial background noise and overlapping speech. Much of the taped discussion is completely inaudible.

---

[81] The significance of this list of politicians and of the government's decision not to investigate the named individuals discussed at p. 80 *supra.*

[82] The Select Committee asked the FBI for all records showing when Weinberg had arrived in New York on March 30, 1979, when he had left Florida, what flight he had taken, and when he had arrived at the Hauppauge Resident Agency. The FBI was unable to locate any such records, and none of the special agents could recall Weinberg's schedule. This failure to record or in some way to obtain and to preserve evidence of the informant's schedule and whereabouts on the day of an important planned meeting and on the day before a major bribe meeting is yet another example of the deficient recordkeeping and deficient supervision of the informant in Abscam.

[83] Joseph DiLorenzo, Errichetti's nephew, who drove Errichetti to the airport to meet Weinberg, remembered nothing about the meeting or what was said. (Sel. Comm. interview of Joseph DiLorenzo, Sept. 10, 1982.)

[84] See pp. 253–57 *infra.* for a more detailed explanation of this meeting.

On the tape that was recorded on Weinberg's body recorder, Weinberg can be heard telling Errichetti, "I got to speak to you. Meantime, I gotta (inaudible) about five minutes alone. All right?" ([Deleted]) Later, on both tapes the sounds of someone leaving the table can be heard, and that is followed by sounds of walking outside. On both tapes Errichetti then asks Weinberg if DiLorenzo has given him a copy of "the book."[86] On both tapes Weinberg tells Errichetti's to get McDonald home because he looks nervous. Errichetti's response is not equally clear on the two tapes. By listening to both, the Select Committee has determined that Errichetti, referring to McCloud, said:

> That fuckin' schmuck. I'll kill him. What the fuck did he think I move him up here for. Jerk him off? Say, "Hello?" I said to him, "Hey, the money for our future." Now, what the fuck I gotta do, draw a picture for that mother fucker?
>
> That guy was always fuckin' useless. This guy [MacDonald] was so fuckin' happy coming up here in the car.
>
> Will I see you [Weinberg] tomorrow, or what? ([Deleted])

Weinberg replied, "I'll give you a call. Don't worry about it. I'll explain to Tony." Errichetti mumbled, "There's nothing to tell," to which Weinberg replied, "Hey, I'll come see you tomorrow. Don't worry about it." Errichetti concluded, "I won't say nothing to Tony." At this point in the tape, Amoroso's voice is heard, for the first time in several minutes, saying "I'm gonna throw mine away." ([Deleted])

It is difficult to determine where Amoroso was during this conversation. He told the Select Committee that he always had control of the briefcase with the Nagra recorder. Yet, from listening to both of the tapes, the Select Committee finds it obvious that Errichetti and Weinberg were speaking about Amoroso as if he were not there—for example, "I won't say nothing to Tony." Although the tapes show that Weinberg told Errichetti that they had to speak alone, Amoroso says he does not recall Weinberg's and Errichetti's going anywhere by themselves during the meeting. When shown the transcripts of the tapes described above, Amoroso concluded that they reflected a conversation at the table. Weinberg testified that he, Errichetti, and Amoroso left the restaurant and went to Errichetti's car, where Errichetti gave them the book. He testified that he believed that Amoroso had left the briefcase with the Nagra at the table. (Sel. Comm. Hrg., Sept. 16, 1982, at 82-86 (testimony of Melvin C. Weinberg).)

---

[85] In his testimony before the Select Committee, Weinberg claimed to have been wearing a "wire," which is a transmitting device that does not record. The wire transmits to monitoring agents who can tape record if they so wish. Weinberg claimed that the wire would not transmit in the building. (Sel. Comm. Hrg., Sept. 16, 1982, at 87–88 (testimony of Melvin C. Weinberg).) Amoroso and FBI HQ Supervisor Michael D. Wilson said no one ever used a wire during Abscam, because of dangers peculiar to that monitoring device. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) The FBI has confirmed that Weinberg was in fact wearing a body recorder on March 31.

[86] The book in question was a picture book of the New Jersey State Legislature, in which Errichetti had placed check marks next to those individuals he considered corrupt. The book was given to Amoroso, who created an evidence and chain-of-custody file for it. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.)

The Select Committee concludes that Amoroso, not having reviewed the tapes before talking to the Select Committee, is mistaken in this case.[87] Weinberg also was incorrect. The Select Committee concludes that when the three men went to retrieve the picture book, Weinberg and Errichetti walked ahead, somewhat out of Amoroso's hearing range. This conclusion is buttressed by the fact that Weinberg's body recorder made a clearer tape than did the recorder in the briefcase. Thus, even though Amoroso was nearby Weinberg and Errichetti engaged in a brief private conversation.

The Select Committee concludes that, during the conversation described above, Weinberg and Errichetti confirmed their previously planned meeting for April 1. As DiLorenzo, Errichetti, and MacDonald prepared to drive away, Errichetti said to Weinberg, "I'll give you a call tonight." Weinberg replied, "Don't worry about it," and Errichetti said, "I'll see you tomorrow." ([Deleted])

The Select Committee concludes, therefore, that Weinberg misled the Committee when he attempted to explain his remarks on this tape. Weinberg claimed that the statement on the tape, "I'll explain to Tony," referred to the $25,000 Errichetti had agreed to take out of the $100,000 to give to DeVito to pay for repairs to the Abdul Enterprises yacht.[88]

DiLorenzo told the FBI on June 10, 1980, that in the morning of April 1, 1979, he again had driven his uncle, who had had a briefcase with him, to Long Island. They drove to a rest stop near Exit 52 or 53 of the Long Island Expressway. Shortly thereafter, Weinberg arrived, driving a Lincoln Continental. Errichetti, carrying the briefcase, went to Weinberg's car for a few minutes and returned empty-handed. (Martin F. Houlihan FD 302, June 10, 1980.)

DiLorenzo recounted to the Select Committee the events of April 1, 1979, in a version consistent with his earlier account. He said that he had driven to a highway rest area with benches and telephones. The rest area was a few exits prior to the exit to the Holiday Inn, which is Exit 55. Errichetti made a call from one of the rest area telephones, and shortly thereafter Weinberg appeared alone. Errichetti then went with a briefcase to Weinberg's car and returned to his own car without the briefcase. (Sel. Comm. interview of Joseph DiLorenzo, Sept. 10, 1982.)

Errichetti testified that on April 1 DiLorenzo had driven him to Exit 55 or 54 of the Long Island Expressway, where he, Errichetti, had placed a call to Weinberg. Weinberg then drove to the rest stop, and Errichetti gave him a briefcase containing $37,500. (Sel.

---

[87] DiLorenzo told the FBI on June 10, 1980, that, at one point during the meeting in the restaurant of the Hauppauge Holiday Inn, Errichetti, Weinberg, and DeVito had gone to Errichetti's car. (Martin F. Houlihan FD 302, June 10, 1980.)

[88] Errichetti had been told that DeVito was in trouble with the sheik for having allowed a fire to occur on the yacht in Florida. A fire actually had occurred, and the FBI did have to make repairs. Errichetti agreed to refund $25,000 to help DeVito save his job.

Comm. Hrg., Sept. 15, 1982, at 136 (testimony of Angelo J. Errichetti).)

The Select Committee notes the unusual consistency between Errichetti's and DiLorenzo's accounts of the April 1 event. Nevertheless, were those stories the only evidence that Weinberg shared in the MacDonald bribe, the Select Committee would not conclude that Weinberg and Errichetti met on April 1 and that the bribe-sharing occurred. For reasons noted throughout this report, neither DiLorenzo nor Errichetti is a credible witness. Even in explaining the events of March 30 and 31 and April 1, DiLorenzo displayed a remarkably inconsistent memory. He remembered nothing of the March 30 meeting and nothing of substance about the March 31 meeting that might have harmed his uncle. Errichetti's account of the events of March 30 and 31 and April 1 is replete with incredible assertions. His explanation of the entire MacDonald transaction, explained in detail at pages 257–60 *infra,* provides one example. He alleges that, as with the alleged payment of $25,000 to Weinberg on January 20, the money allegedly paid to Weinberg on April 1 was to have been placed in an escrow account for use when both Errichetti and MacDonald retired. For the reasons explained above in relation to that earlier allegation, the Select Committee disbelieves Errichetti's story about an escrow account.[89]

The primary basis for the Select Committee's finding that Weinberg met with Errichetti on April 1, 1979, and shared in the $100,000 bribe is an audio tape of a conversation between Weinberg and Errichetti that purportedly was made and recorded at 2:30 p.m. on April 1, 1979, but in fact was made and recorded at 4:54 p.m.

Telephone records show that, shortly after the MacDonald bribe, two calls were made from Weinberg's home to Errichetti's office in Camden. The records show a call on March 31, 1979, at 8:53 p.m. lasting four minutes and a call on April 1, 1979, at 4:54 p.m. lasting eight minutes.

Of the many hundreds of tapes recorded by Weinberg, the April 1 audio tape is the only that includes a preamble stating the time of the call. The tape begins with Weinberg's stating, "April 1, 2:30 p.m. Sunday. I am returning the Mayor's call." ([Deleted]) By listening to and timing the conversation that immediately follows the preamble, the Select Committee found that the length of that conversation matches the eight minutes that the telephone toll records show for the call between Weinberg's home and Errichetti's office at 4:54 on April 1.[90]

---

[89] In an affidavit filed shortly before her death, Weinberg's estranged wife, Cynthia Marie Weinberg, alleged that she had witnessed Weinberg receiving a cash payment from Errichetti. (Marie Weinberg Affidavit.) It is clear, however, that she was not referring to April 1, 1979. First, the affidavit allleges that the payment was made in late 1978 or early 1978, not in the spring of 1979. Even if she meant "early *1979,*" April 1 is a date that barely fits that description. Second, she says she drove Weinberg, but both DiLorenzo and Errichetti say he was alone at the April 1 meeting. Third, her story has Weinberg going to Errichetti's car, but DiLorenzo and Errichetti have Errichetti going to Weinberg's car. Finally, she averred that the meeting had taken place at the Hauppauge Holiday Inn; DiLorenzo, however, was clear that the April 1, 1979, meeting was at a rest stop near an exit before the exit to the Holiday Inn.

Because of her suicide, her unstable mental state, her bitterness toward her husband, the vagueness of her affidavit, the several material conflicts between her allegations and those of DiLorenzo and Errichetti, and the conflict between her allegation of the time of year and April 1, the Select Committee cannot grant much weight to Cynthia Marie Weinberg's allegations as support for the alleged April 1 bribe-sharing.

The Select Committee disbelieves Weinberg's explanation of why this particular tape, out of the hundreds he recorded, has a preamble. Weinberg testified before the Select Committee that Amoroso had been at his house on the morning of April 1 and had instructed him to place the preamble on the tape because the call was to arrange for Errichetti to return $25,000 of the MacDonald bribe money to DeVito. Weinberg also testified that he believed that Amoroso had been present when he had recorded the preamble. (Sel. Comm. Hrg., Sept. 16, 1982, at 105 (testimony of Melvin C. Weinberg).)

Amoroso denied that he ever had ordered Weinberg to ensure that arrangements for the return of the $25,000 were recorded. He acknowledged that he had been at Weinberg's home for breakfast between 11:00 a.m. and noon on April 1, but he did not remember having heard Weinberg record the preamble. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982).) FBI records show that if, as he claims, Weinberg recorded the preamble at 2:30 p.m., Amoroso could not have heard Weinberg record the preamble, because Amoroso took a 1:00 p.m. limousine from the Hauppauge Ramada Inn to LaGuardia Airport.[91]

The telephone call arranging for the return of some of the bribe money was important. But it was no more important than countless other telephone calls during Abscam, none of which Weinberg preceded with a preamble, and many of which he did not even bother to record.

In his testimony Weinberg attempted to discount the significance of the time error in the preamble by saying that he often had made mistakes while taping. He testified that he had recorded the preamble, had stopped the machine, and then had tried to call Errichetti.[92] When he found that Errichetti was not home, he placed the recorder down and "probably watched TV." When he later called Errichetti again and did talk to him, he forgot about the preamble. (Sel. Comm. Hrg., Sept. 16, 1982, at 107-12 (testimony of Melvin C. Weinberg).)

The Select Committee concludes that Weinberg lied when he so testified. Contrary to Weinberg's testimony, Amoroso could not have been present when the preamble was recorded. Moreover, the Select Committee refuses to believe that, after having recorded a preamble for the one and only time over a two-year period, Weinberg accidentally waited two and one-half hours to try again to make the call, and then forgot about the unique preamble that he had put on the tape, and forgot to make a new preamble stating the correct time.[93]

---

[90] Mayor Errichetti insisted vehemently that the conversation was actually recorded on March 31. (Sel. Comm. Hrg., Sept. 15, 1982, at 134-38, 226 (testimony of Angelo J. Errichetti).) He unquestionably is mistaken. The call at 8:53 on March 31—a four-minute call—is too short to be the call in question.

[91] The records also show that he flew to Montreal at 3:40 p.m. on April 1, 1979, returning on April 4. (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 4, 1982).)

[92] A laboratory report of the FBI Technical Services Division dated February 10, 1981, indicated that the recording was stopped following the preamble and preceding the dial tone. (*Myers* D.P. Ex. 79.) This finding is consistent with Weinberg's story. He recorded the preamble and stopped the machine. At some later point, he again began recording. According to the testimony of Donald V. Ritenour, Jr., the technician who made the aural examination of the tape, there is no way to determine the length of the interval between the stop and the resumption of recording. (*Myers* D.P. Tr. 3835-36.)

Further, the conversation on the April 1, 1979, tape differs markedly from other Abscam tapes. Errichetti's language, for example, is totally devoid of scatological and sexual expletives, a statement that cannot be made about any other recorded conversation in which he participated for more than a minute or two. The dialogue between Weinberg and Errichetti is forced and unnatural. The difference, apparent even when one reads the transcript, is overwhelming when one hears the actual tape. It is virtually impossible to conclude that the subject matter and tone of the tape were not planned beforehand.

Another unusual feature of the recording is Errichetti's explanation of the division of the bribe money. According to the April 1 tape, Errichetti gave the entire amount to MacDonald and told him of DeVito's troubles, and MacDonald then agreed to give DeVito $25,000. Errichetti said on tape that MacDonald was very happy with the $75,000. ([Deleted]) The understanding reached earlier, however, was that the $100,000 was for all of the Casino Control Commissioners, not just for MacDonald. It is strange, therefore, that Errichetti spoke as if only MacDonald were being bribed and as if MacDonald could freely give away portions of other commissioners' shares. It also is strange that Errichetti spoke as though he himself were not receiving any portion of the payment. It is unlikely that Errichetti would have made such an out-of-character representation without some prearrangement.

Errichetti testified that Weinberg had told him that the conversation was being monitored by Margo Kennedy (Special Agent Margot Denedy) so that she could report to the sheik whether MacDonald was happy and whether Abdul Enterprises would get its casino license. (Sel. Comm. Hrg., Sept. 15, 1982, at 135, 140–41 (testimony of Angelo J. Errichetti).) The Select Committee accepts Errichetti's explanation, because it is the most reasonable one that has been offered to explain the artificial nature of the conversation.[94]

The final details of the April 1 conversation at 4:54 p.m. may have been established in the four-minute call from Weinberg to Errichetti at 8:53 p.m. on March 31.[95] Weinberg testified to the Select Committee that he had not talked to Errichetti in that call, because Errichetti had not been at home; rather, Weinberg "probably spoke to his [Errichetti's] wife." (Sel. Comm. Hrg., Sept. 16, 1982, at 97–98 (testimony of Melvin C. Weinberg).) That testimony, however, plainly was false. Telephone toll records obtained by the FBI show that the call at 8:53 p.m. on March 31 was made to Errichetti's office, not to his home; it is nearly inconceivable that Errichetti's wife was alone at the Mayor's office at 8:53 p.m. on a Saturday night. Further, there is no other instance between December 1, 1978, when Weinberg first met Errichetti, and February 2, 1980, when the covert stage of Abscam ended, in which Weinberg talked for as much as three minutes and as to which he claims the other conversationalist was Errichetti's wife. All recorded conversations between Weinberg and Errichetti's wife are of but a few seconds in duration.

---

[93] The Select Committee concludes that Weinberg also lied when he testified that his daughter and her family visited him that day and that John Good knew about this visit. First, Weinberg had never mentioned this story to the MacDonald grand jury or to any FBI agent or Department of Justice attorney. Also, Weinberg claimed to have told John Good (*id.*), but Good never mentioned it to the Select Committee. When asked by the Select Committee, Good had no recollection of Weinberg's having told him that he had spent April 1, 1979, with his daughter.

[94] On the other hand, Errichetti, too, appears to have testified falsely about the April 1 conversation. He told the Select Committee that he was at home when he received Weinberg's call at 8:53 p.m. (Sel. Comm. Hrg., Sept. 15, 1982, at 136 (testimony of Angelo J. Errichetti)), and that Mrs. Errichetti "was sitting in the next room" (*id.* at 140). Telephone toll records show, however, that the March 31 call at 8:53 was to Errichetti's *office*.

[95] As explained above, the April 1 conversation is strained and artificial. Early in the conversation Weinberg and Errichetti make a point of agreement that this is their first contact since their meeting with MacDonald and DeVito the previous day. At one point Weinberg says, "That's the reason I didn't call you yesterday." ([Deleted]) The telephone records show, however, that Weinberg did call Errichetti's office the day before at 8:53 p.m. for four minutes.

The Select Committee concludes that Weinberg deliberately created a misleading preamble and that he convinced Errichetti what to say during the April 1 conversation. The Select Committee can conceive of no motivation for these actions other than the creation of an alibi. Thus, the Select Committee concludes that Weinberg met Errichetti on April 1, 1979, and probably received some share of the MacDonald payment.[96]

Weinberg wasted no time in establishing his alibi. A report to FBI HQ dated April 2, 1979, says, "Weinberg called Errichetti at 2:30 p.m., 4-1-79." ([Deleted]) The Select Committee has been unable to determine who wrote that document or what Weinberg said or did to ensure that an exculpatory account of his whereabouts on the afternoon of April 1 was in the FBI records, except that he wrote the date and "2:30 p.m." on the tape cassette.[97] (Sel. Comm. Hrg., Sept. 16, 1982, at 102–04 (testimony of Melvin C. Weinberg).) Given the importance to Weinberg that the FBI believe he was talking to Errichetti on the telephone in the early afternoon of April 1, it is highly probable that Weinberg promptly told someone in the Hauppauge Resident Agency about the tape's existence, but not about the contrived nature of the tape.

Special Agent McCarthy told the Select Committee that he recalled neither the April 1 tape recording nor the April 2 teletype. Although he would not categorically deny being responsible, he suggested that either Amoroso or someone else wrote the teletype. (Sel. Comm. interview of John M. McCarthy, Sept. 2, 1982.) Amoroso was clearly not responsible, because he was in Canada between the afternoon of April 1 and April 4, 1979, testifying in another case. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982; letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 4, 1982).) Indeed, there is no evidence that anyone at the FBI even listened to the April 1 tape before reporting to FBI HQ that it reflected a call made at 2:30 p.m.

---

[96] Errichetti testified that he gave $37,500 to Weinberg and kept $37,500 for himself. He said that MacDonald got nothing, because the other $25,000 went to Amoroso. (Sel. Comm. Hrg., Sept. 15, 1982, at 135 (testimony of Angelo J. Errichetti).) The Select Committee cannot rely on Errichetti's account in this regard, although it is possible that MacDonald never actually received any money. The evidence is not strong enough for the Select Committee to reach a reasonable conclusion regarding the distribution of the $100,000. (*See* pp. 257–61 *infra.*) The only evidence available to the Select Committee is conflicting uncorroborated testimony of Errichetti and Weinberg.

[97] Weinberg's admission that he wrote "2:30 p.m." on the cassette further proves that he intentionally contrived the misleading tape. According to him, he forgot the 2:30 preamble when he called at 4:54, but he remembered the 2:30 preamble and forgot the 4:54 call when he gave the tape to the FBI several hours later.

Weinberg testified that he had marked the date and the time on the tape and had given the tape to the FBI, probably the next day. He never told anyone that the time he had marked on the cassette was incorrect. (Sel. Comm. Hrg., Sept. 16, 1982, at 102–04 (testimony of Melvin C. Weinberg).) He contended that this tape was no different from any number of other tapes that he inadvertently had labelled incorrectly and never had corrected.

The Select Committee finds Weinberg's explanation unpersuasive. First, the Select Committee does not believe that Weinberg ordinarily labelled his tapes before he knew who was being recorded. He himself testified that it often happened that the party he was calling was not available. He also testified that he frequently had to complain about how few tapes the FBI provided him. Given those circumstances, it is unlikely that he risked mislabelling a tape. Also, although Weinberg undoubtedly made mistakes on other cassettes, it is inconceivable that he made a mere labelling error on the April 1 tape. He acknowledges that he deliberately made a preamble on the tape. He was more aware of the time of that call, therefore, than of any other call. Moreover, if it was his practice to label a cassette just before he placed a call, he would have done so at 4:54 p.m. and would have noticed the inaccurate 2:30 p.m. label at that time. Even accepting his story that the preamble was innocent (which the Select Committee does not), he clearly knew when he gave the tape to the FBI that it had not been recorded at 2:30 p.m.

When DiLorenzo's allegations surfaced on June 10, 1980, the FBI relied on the April 1, 1979, tape to discredit them. A teletype dated June 18, 1980, from the Newark Field Office of the FBI to the Director,[98] referred to the transcript of the April 1 tape, saying that the call, made to Errichetti at 2:30 p.m., indicated that this was the first contact Weinberg had had with Errichetti since March 31, thereby discrediting DiLorenzo (who had told the FBI that he had picked up Errichetti on the morning of April 1 to drive to meet Weinberg).[99] ([Deleted])

After a brief discussion of the alleged January 20 bribe-sharing and William Rosenberg's allegations about certificates of deposit, the teletype concludes with the statement that Weinberg had provided a detailed explanation that tended to substantiate his position "in the matter." It is unclear whether this conclusion refers only to the Rosenberg issues or includes the April 1 issues, as well.

On the same day, June 18, 1980, another teletype regarding DiLorenzo's allegation of bribe-sharing on April 1 was sent from the New York Field Office of the FBI to the Director. This document stated that Weinberg had denied the allegation. It further stated that Weinberg's recollection that he had called Errichetti to verify the meeting of March 31, 1979, had been confirmed by telephone records. The teletype concluded by referring to a conversation recorded on April 1, 1979, during which both Weinberg and Errichetti had discussed the previous day's events, but during which neither had made any reference to any meeting on April 1.[100] ([Deleted])

---

[98] A copy was hand-delivered to John Good.

[99] Since Amoroso was with Weinberg until approximately noon on April 1, and since the driving trip from Camden to Long Island takes about two and one-half hours, it would have been almost impossible for Errichetti to have met Weinberg in Long Island after Amoroso had left and to have been in Camden at 2:30 p.m.

The FBI relied on Weinberg's deception and failed to investigate DiLorenzo's story thoroughly. The Select Committee is especially disturbed by the June 18, 1980, teletype from the New York Field Office, which refers to both the telephone records of April 1 *and* the April 1 tape without disclosing, and apparently without the FBI's even having noticed, the patent discrepancy between the two sources of information. Once DiLorenzo had made his contentions, Weinberg should immediately have been made to account for the misleading preamble, and the tape should have been subjected to the FBI's rigorous laboratory analysis. Instead, the New York special agents readily accepted Weinberg's story and failed to analyze the tape until February 1981, after federal prosecutor Reid Weingarten had checked the telephone records in December 1980 and had discovered the major flaw in Weinberg's story.[101]

For all of the foregoing reasons, the Select Committee rejects, and indeed finds no justification for, the FBI's conclusory assertion with respect to Weinberg's April 1, 1979, bribe-sharing. On November 5, 1982, the FBI contended:

> The various allegations of wrongdoing by Melvin Weinberg have been the subject of lengthy and thorough judicial, prosecutorial, and investigative review. These allegations remain unproven, and the "substantial evidence" cited in the [Select Committee's] staff report remains unpersuasive. (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr., at 6 (Nov. 5, 1982).)

The Select Committee finds the combination of Weinberg's creation of misleading evidence, his contemporaneous misleading representations, the tapes of March 31, 1979, the tape of April 1, 1979, the telephone toll records, the testimony of Errichetti and DiLorenzo (which, had it been uncorroborated, would have been of little, if any, value), Amoroso's travel schedule, and Weinberg's subsequent lies about the events of March 31 and April 1, 1979, to be overwhelmingly strong proof that Weinberg shared in the $100,000 bribe. The *only* contradictory evidence is Weinberg's uncorroborated denial.

Moreover, contrary to the FBI's contention, Weinberg's bribe-sharing has not been the subject of judicial review, much less of "thorough judicial . . . review." Only a grand jury has considered the bribe-sharing allegations, and it did so without the benefit of much of the evidence and analysis presented by this report and under circumstances totally unlike those that govern at a trial.

---

[100] The points made by the New York special agents were extremely weak. If Weinberg, as DiLorenzo had alleged, was trying to delude the FBI, he obviously would deny the allegations. Similarly, if the whole purpose of the April 1 tape was to delude the listener into thinking that MacDonald had received all of the money, the participants obviously would not discuss the meeting at which they split the money between themselves.

[101] The Select Committee is also disturbed by the lack of communication among various FBI offices and federal prosecutorial offices. The Newark Field Office teletype relies only on the timing of the preamble. The New York Field Office teletype refers to telephone records. New Jersey federal prosecutors Plaza and Weir claim that they were unable to obtain telephone records from FBI special agents and federal prosecutors in New York.

Even the prosecutors from the Public Integrity Section were misled by the April 1 tape for a long while. As late as November 28, 1981, Weingarten and his co-prosecutor Eric Holder wrote a memorandum that used the April 1 tape to rebut DiLorenzo's allegations.

Finally, the Select Committee has seen no document in the many thousands of FBI and Department of Justice documents it has reviewed that reflects anything resembling a "thorough . . . prosecutorial, and investigative review" of the bribe-sharing allegations. The FBI laboratory analysis of the April 1, 1979, tape was not completed until February 1981, nearly two years after the event, one year after the covert stage had ended, and after seven of the eight original Abscam trials had been completed. Except for a late-1981 memorandum by Special Agent Houlihan expressing concern about these problems and alluding to a small number of the factors discussed above, no FBI document notes the five unrecorded calls from Weinberg to Errichetti on March 26–29, 1979; analyzes the conversation recorded on March 29, 1979; explains Weinberg's having stayed at a hotel a few miles from his house on March 30, 1979; explains why Weinberg did not submit, or why the FBI did not keep, travel vouchers reflecting his schedule and whereabouts on March 30; explains what was said at the March 30 Weinberg-Errichetti meeting; explains how Errichetti came to write and give to Weinberg the list of allegedly corrupt politicians on March 30; analyzes in detail the two March 31 tapes, including Weinberg's statement, "Hey, I'll come see you tomorrow"; analyzes in detail the language on the April 1 tape; analyzes the toll record of the call at 8:53 p.m. on March 31; notes that that call and the call at 4:54 p.m. on April 1 were to Errichetti's office; discusses who was and who was not with Weinberg on April 1; discusses Amoroso's travel schedule; or even mentions the April 2, 1979, document sent to FBI HQ erroneously stating, "Weinberg called Errichetti at 2:30 p.m., 4-1-79."

3. The Myers, Lederer, Thompson, and Murphy Payments

On August 22, 1979, Errichetti and Representative Michael Myers met with DeVito (Amoroso) and Weinberg. DeVito gave Myers an envelope containing $50,000. Errichetti testified before the Select Committee that after the meeting Myers had given him the envelope. Errichetti said he then had removed $15,000, and had given the remaining $35,000 to Howard Criden. (Sel. Comm. Hrg., Sept. 15, 1982, at 201–03 (testimony of Angelo J. Errichetti).)[102] Errichetti further testified that he had kept $5,000 of the $15,000 and had given the remaining $10,000 to Weinberg. He was unsure of precisely when he had given Weinberg the $10,000, but he was sure that it had occurred in a restroom at the JFK Hilton. (*See id.* at 203.)

Errichetti acknowledged that he had received $5,000 to $7,500 from the Lederer payoff, and he denied having shared that money with Weinberg. (*Id.* at 204.) Similarly, he testified that he had been paid "neglible amounts" (a "couple of thousand" dollars) from each of the Thompson and Murphy payoffs, but had not shared his payments with anyone. (*Id.* at 210–12.)[103]

---

[102] This testimony is consistent with Howard Criden's *in camera* testimony during the *Jannotti* trial. (*Jannotti* Trial Tr. 1.19.)

[103] Errichetti also claimed to have received $700 from the payoff to Philadelphia City Council President George Schwartz.

Errichetti's testimony on the amount of money he received from the Lederer, Thompson, and Murphy transactions conflicts with the testimony of Ellis Cook and Howard Criden. Cook was Criden's law partner. After each bribe session with a Congressman, Criden met with Cook, gave Cook a share, and explained how the rest of the money was being split. Cook testified that Criden had told him that Errichetti had taken $20,000 (not $5,000 to $7,500) of Lederer's bribe, of which $5,000 supposedly was going to Weinberg and DeVito. (*Lederer* Trial Tr. 663–64.) Cook also testified that it had been his understanding that Errichetti would get $10,000 from Thompson's payment and $10,000 from Murphy's (not "a couple of thousand") and that DeVito and Weinberg would share $5,000 for each Representative. (*Thompson* Trial Tr. 1246, 1252.)

Criden testified before the Select Committee that he thought Errichetti had paid both DeVito and Weinberg out of Errichetti's share of Myers' bribe. Criden first said that he had no similar understanding with regard to any other payment; but after conferring with his counsel, he changed his testimony and stated that he understood that Errichetti was supposed to have "taken care of" DeVito and Weinberg out of Errichetti's share of the Lederer, Thompson, and Murphy payments. (Sel. Comm. Hrg., Sept. 14, 1982, at 29–31 (testimony of Howard L. Criden).) Criden admits that he never discussed bribe-sharing with either DeVito or Weinberg; but, because he continued to pay Errichetti, and because neither Weinberg nor DeVito complained about not being paid, Criden assumed they were being paid adequately. He never actually asked Errichetti, however, whether Errichetti was in fact sharing the bribes. (*Id.* at 33–35.)

The Select Committee asked Abscam prosecutor Thomas Puccio whether it was possible that Weinberg had shared in the bribe payments made to Members of Congress. Puccio summarily dismissed the possibility, saying that he knew where all the money had gone. When confronted with Cook's testimony that Weinberg and DeVito had shared in bribes, which was the only sworn testimony on record at that point, Puccio declared that Criden had been lying to Cook in order to increase his own share. Puccio told the Select Committee that Criden had accounted for all the money when Puccio had interviewed him on February 2, 1980. Puccio admitted that a portion of each bribe had gone to Errichetti but stressed that no defense lawyer and no defendant had alleged that Weinberg had shared a bribe. (Sel. Comm. Hrg., July 27, 1982, at 161–63 (testimony of Thomas Puccio).)

The Select Committee has been unable to review Criden's February 2, 1980, statement, because that statement is under judicial seal. Nevertheless, the Select Committee finds that Puccio overstated the case by saying that he had accounted for all of the monies paid to Representatives Myers, Lederer, Thompson, and Murphy.[104] First, Errichetti now has alleged that he shared one of the above payments with Weinberg. Second, Criden, in his testimony before the Select Committee, did not "account" for all of the payments; he testified that he had understood from Errichetti that Weinberg was receiving money. At the very least, Criden could not have given Puccio anything more than second-hand information about what Errichetti had done with respect to sharing with Weinberg. Finally, the newspaper accounts of Criden's sealed statement indicate that the story Criden gave to Puccio on February 2, 1980, might have had Errichetti receiving sums large enough to be shared with Weinberg. A story in the *Washington Post* on July 13, 1980, described Criden's unsigned February 2, 1980, affidavit as saying that Criden, Errichetti, and Silvestri had divided $30,000 of the $50,000 Thompson payment and that Criden and Errichetti had split $30,000 of the $50,000 Murphy payment.[105]

---

[104] Representative Jenrettee allegedly received $40,000 of the $50,000 payment to middleman John Stowe on December 6, 1979. (*Jenrette* Gov't Trial Ex. 17C, at 8.) Representative Kelly was given $25,000 on January 8 by Amoroso. On February 3, 1980, Kelly returned $24,826, having spent the other $174.00. (*Kelly* Gov't Trial Ex. 31.) Neither of these cases involved Errichetti, and neither presents a claim of alleged bribesharing.

The Select Committee is unable to determine who, if anyone, has told the truth on the bribe-sharing issue. There is insufficient extrinsic evidence to determine whether Weinberg shared in these four bribes. Even Errichetti's denial that he split any of the Lederer, Thompson, and Murphy payments with Weinberg is unpersuasive. Errichetti's own account of his share of those bribes states much lower figures than do Criden's and Cook's accounts. Errichetti has an incentive, therefore, to downplay his importance in those four bribes; given his testimony that he received only negligible amounts of money, he could not readily claim to have shared those small sums with Weinberg.

Similarly, Errichetti's uncorroborated allegation that he gave Weinberg $10,000 from the Myers bribe is insufficient to justify a conclusion that Weinberg received a portion of that bribe. Errichetti's inability to provide any details that might enable the Select Committee to conduct more thorough investigation further lessens his credibility.

Errichetti also has alleged that in October 1979 Weinberg asked him for $5,000 to retire some of DeVito's supposed gambling debts. Errichetti told the Select Committee that DiLorenzo and his girlfriend, Debra Procacci, delivered an envelope containing $3,000 to Weinberg, who was with an unidentified stranger, on October 21, 1979, at the Ionosphere Lounge in LaGuardia Airport. (Sel. Comm. Hrg., Sept. 15, 1982, at 237–40 (testimony of Angelo J. Errichetti).) The Select Committee concludes that Errichetti's story about DeVito's gambling debts is totally uncorroborated, highly implausible, and probably false,[106] but that the payment of money to Weinberg on October 21, 1979, may well have occurred for a different reason.

Errichetti's basic account of the actual payment to Weinberg on October 21 has been confirmed by DiLorenzo and Procacci. Procacci testified at the *Myers* trial on August 26, 1980, that she and DiLorenzo had driven to LaGuardia "after the summer," in late September or October, to deliver an envelope to Weinberg. She had met with another man while DiLorenzo had given Weinberg the envelope, but she did not know whether the man had been there with Weinberg.[107] (*Myers* Trial Tr. 3127–29.)

---

[105] *Washington Post,* July 13, 1980, at A1, A5. The newspaper story does not indicate how the specified sums were divided among the middlemen. It is consistent with Criden's testimony that he gave Thompson $20,000 out of the October 9 payment and $20,000 out of the October 20 payment. (Sel. Comm. Hrg., Sept. 14, 1982, at 83, 88 (testimony of Howard L. Criden).)

[106] *See* pp. 128–29 *supra.*

DiLorenzo's story matches Procacci's in every particular and confirms Errichetti's. DiLorenzo told the Select Committee that he had delivered an envelope to Weinberg on a Sunday afternoon in October 1979, the day of the funeral of a city lawyer of the Jewish faith. DiLorenzo said he had no idea of what was in the envelope. Weinberg had been sitting in the Ionosphere Lounge and talking with another man; DiLorenzo did not know whether Weinberg and the man had been together. (Sel. Comm. interview of Joseph DiLorenzo, Dec. 3, 1982).[108]

Errichetti testified that the alleged payoff had been scheduled for a Sunday in late October. He remembered that he had been unable to attend because of the funeral of his special counsel. (Sel. Comm. Hrg., Sept. 15, 1982, at 238 (testimony of Angelo J. Errichetti).) Errichetti later confirmed that this funeral had been on October 21, 1979.

The date of the alleged delivery of an envelope to Weinberg is one day after the $50,000 payment to Criden in Representative Murphy's presence. Criden said that he had split some of that payment with Errichetti. Cook's testimony indicated that the money had not been divided as of Monday, October 22, 1979. (*See Thompson* Trial Tr. 1252.) If Criden had given Errichetti his cut earlier, however, October 21 would have been a logical time for Errichetti to have delivered Weinberg's share.

The evidence that Weinberg shared in any of the payments to Myers, Lederer, Thompson, and Murphy is far from compelling, but the Select Committee finds that it is likely that he did share in one or more of those bribes. Aside from Cook's and Criden's wholly uncorroborated testimony that each of them had believed that Errichetti was splitting his bribe shares with Weinberg and DeVito, the Select Committee finds absolutely no evidence suggesting that Special Agent Amoroso, through his role as Tony DeVito, solicited, received, or was promised any share of any Abscam bribe payment.

C. Allegations of False Reporting by Melvin Weinberg Regarding Fraudulent Securities

On October 30, 1978, Melvin Weinberg handed to Special Agent John M. McCarthy in New York fraudulent certificates of deposit with a face value of $300 million and fraudulent letters of credit with a face value of $300 million. He informed McCarthy that a businessman named William Rosenberg had provided the fraudulent securities. On November 20, 1978, Weinberg handed to Special Agent Gunnar Askeland in Florida additional fraudulent securities of the same nature and of the same face values, again stating that William Rosenberg had provided them. On March 8, 1979, Special Agent Anthony Amoroso reported to FBI HQ that on that date

---

[107] Procacci's testimony about this meeting was elicited by Puccio during cross-examination.

[108] At first DiLorenzo had no memory of any trips to the LaGuardia airport with Procacci other than the one to deliver a gift in March 1979. When asked whether there had been any such trips in the autumn of 1979, DiLorenzo provided the detailed account described above.

Mayor Angelo Errichetti had handed him fraudulent certificates of deposit with a face value of $435 million. (*See* [Deleted])[109]

Edward J. Plaza, who was an Assistant United States Attorney in New Jersey during the Abscam investigation, has alleged that Weinberg participated actively in the creation of those fraudulent securities and then led the FBI to believe tht Rosenberg and Errichetti had produced them. (*See* Sel. Comm. Hrg., July 28, 1982, at 32-34 (testimony of Edward J. Plaza).) Robert A. Weir, an Assistant United States Attorney in New Jersey during the Abscam investigation and today, has made similar allegations. (*See* House Jud. Subcomm. Hrg., June 2, 1982, at 70-71 (testimony of Robert A. Weir).) In their testimony before the Select Committee, Rosenberg and Errichetti asserted that those allegations were correct. Rosenberg and Errichetti also elaborated on the nature of Weinberg's participation in the production of the fraudulent securities. (*See* Sel. Comm. Hrg., Sept. 9, 1982, at 7-58 (testimony of William Rosenberg); Sel. Comm. Hrg., Sept. 15, 1982, at 71-78, 92-101, 109-10 (testimony of Angelo J. Errichetti).)

If those allegations were correct, they would raise several serious problems with respect to the Abscam investigation. They would demonstrate Weinberg's unreliability, lack of credibility, and ability and inclination to steer portions of the Abscam investigation in directions not planned or approved by the FBI. They would demonstrate the FBI's failure to supervise and control Weinberg and the inability of FBI agents to ascertain whether Weinberg was lying about material evidence. Finally, because, as will be explained below, the FBI paid Weinberg a $15,000 bonus based in part on his purported recovery of fraudulent securities from Rosenberg, the allegation that Weinberg himself participated in the production of those securities would, if true, show that he had managed to defraud the government for his own financial gain during the Abscam investigation. Other than to provide cumulative evidence of Weinberg's lack of credibility and reliability, however, the truth of the allegations would not tend to exculpate any of the Abscam defendants, since none of the defendants was prosecuted for any act in connection with the Rosenberg and Errichetti fraudulent securities transactions.

The Select Committee finds that the allegations are substantially erroneous and are correct only in incidental respects. Rosenberg in fact approached Weinberg after having heard from other sources that Weinberg was interested in obtaining fraudulent securities, an interest that the FBI had authorized Weinberg to express from the very beginning of Abscam. Rosenberg and his partners then produced the fraudulent securities without Weinberg's help, although Weinberg provided instructions with respect to the face values, the number of securities, and the names to be used on the securities. Weinberg did not provide Rosenberg with any blank or sample of a security.

With respect to the Errichetti securities transaction, the Select Committee finds that Weinberg provided Errichetti with the blank certificate of deposit that Errichetti used to produce the $435 million in fraudulent certificates of deposit that he handed to Special Agent Amoroso on March 8, 1979; but Weinberg did so with the knowledge and approval of the FBI and for the sole purpose of cementing the relationship between himself and Errichetti by showing that Abdul Enterprises was willing and able to engage in illegal activities. Weinberg never received any bonus in connection with the Errichetti securities transaction.

---

[109] The omission of a citation to a confidental document is identified by "[Deleted]." *See* pp. V-VI *supra*.

Although Weinberg did not defraud the government in connection with the Rosenberg and Errichetti securities transactions, the Select Committee finds several deficiencies in the FBI's conduct in connection with those transactions. First, neither the FBI special agent who received the Rosenberg securities on October 30, 1978, nor the special agent who received the Rosenberg securities on November 20, 1978, prepared a contemporaneous written report describing the circumstances under which the securities had been received. Indeed, neither agent prepared any report on the securities at any time during the covert stage of the Abscam investigation. The same agents also failed to prepare any FD 302 report summarizing any debriefing of Weinberg with respect to the conversations Weinberg had with Rosenberg and Errichetti when he received the securities. Thus, if the government had chosen to prosecute Rosenberg or Errichetti for the production of fraudulent securities, it would have had to rely on the memories of Weinberg and those agents more than a year after the events had occurred.

Second, an FD 302 prepared by Special Agent Gunnar Askeland on January 26, 1979, in connection with the Errichetti securities transaction demonstrates either that Askeland erroneously reported information provided to him by Weinberg that day or that Weinberg lied to him and has continued to lie about the matter summarized in the report. Third, several government attorneys who worked on Abscam in 1979 and in 1980 were erroneously led to believe for a substantial time that the Errichetti securities had been produced entirely by Errichetti and his associates without the direct participation of Weinberg.

1. The Role of Fraudulent Securities Transactions in the Abscam Investigation

The recovery of fraudulent securities was stated as a goal of the Abscam undercover operation in the application for approval sent to FBI HQ by the New York Field Office on May 26, 1978, and in the June 27, 1978, approval memorandum prepared by FBI HQ. Several such recoveries occurred in the first several months of the operation.

The first recovery occurred on July 9, 1978, when Abscam operatives recovered from Frank Kelly and Joseph Gennetti fraudulent gold futures with a total face value of $25 million and fraudulent certificates of deposit with a total face value of $10 million. On July 22, 1978, Abscam operatives recovered from Kelly, Gennetti, Joseph Contorci, and Samuel Battaglia fraudulent gold certificates with a total face value of $19 million. The recoveries on both dates occurred in Florida and were not under the immediate control of FBI personnel in the New York Field Office. ([Deleted]) The government did not prosecute any of those individuals in connection with those transactions.

The next recovery of illegal securities, and the first one in New York, occurred on October 4, 1978, at LaGuardia Airport. On that date, Weinberg, with FBI operatives listening in an adjacent room, purchased from William Bell, Jack Morris, Edward Linnick, and Donald Eacret $200 million in fraudulent certificates of deposit drawn on the International Bank and Trust of the City of London, Ltd. ([Deleted]) The FBI immediately arrested the individuals involved in this venture, including Weinberg (in order to conceal his undercover role).

Supervisor John Good told the Select Committee that, following the arrest of Bell, Morris, Linnick, and Eacret, he had concluded that the publicity generated by this "buy-bust" [110] operation had threatened the continuing viability of Abscam. Good also told the Select Committee that, at about the same point in time, attorneys of the Strike Force for the Eastern District of New York had told him that they had doubts about the prosecutability of such cases. Accordingly, Good told the Select Committee, he had decided to discontinue using the Abscam undercover operation to pursue buy-busts involving fraudulent securities. (Sel. Comm. interview of John Good, Oct. 8, 1982.)

In October 1978 Good told Weinberg there would be no more buy-bust operations and instructed him not to consider the recovery of fraudulent securities as an accomplishment for which he could expect a bonus. (Sel. Comm. Hrg., July 27, 1982, at 19-20 (testimony of John Good).) Good also told Weinberg that it was still permissible to use fraudulent securities to enhance the credibility of Abdul Enterprises with criminals by demonstrating its ability and willingness to become involved in illegal activities. (*Id.*) In October and November 1978, the FBI credited Weinberg with having recovered the following fraudulent securities, in addition to the Rosenberg securities:

1. On October 24, 1978, recovery of $200 million in fraudulent certificates of deposit, drawn on the International Bank and Trust of the City of London, Ltd., from Ben Cohen, Matthew Renda, and Saul Cooper;
2. On November 20, 1978, recovery of $300,000 in cashiers checks, drawn on the First National Bank of Teheran, from Tony Costanza; and
3. On November 29, 1978, recovery of $300 million in fraudulent certificates of deposit drawn, on the First National Bank of Antigua, from George Cannon.

2. The Rosenberg Securities Transactions

On June 17, 1980, Rosenberg was interviewed by Assistant United States Attorneys Stephen Spivack, Roger Adelman, Edward Plaza, and Robert Weir. He contended that the fraudulent securities with a total face value of $1.2 billion that the FBI had attributed to him had in fact been produced by Weinberg. Spivack spoke with Rosenberg about the securities once more before Rosenberg was sentenced on July 3, 1980, and several times after that date. Rosenberg testified about the transaction on February 16, 1981, in the post-trial due process hearings held in the *Myers* case before United States District Judge George C. Pratt. Rosenberg also testified before the Select Committee on September 9, 1982. The following summary of his securities transactions is drawn from all of those sources, from documents of the FBI and of other components of the Department of Justice, from tape recordings of conversations with Rosenberg during the Abscam investigation, and from interviews of several attorneys in the Department of Justice.

---

[110] A "buy-bust" operation is one in which the FBI buys fraudulent securities or other contraband and immediately arrests the seller.

In March 1978 Rosenberg, William Eden, Daniel Minsky, and Max Krauss formed a partnership called Transcom East for the purpose of acting as brokers between companies with capital equipment or other property to lease and companies wishing to lease such property. (Sel. Comm. Hrg., Sept. 9, 1982, at 5–6 (testimony of William Rosenberg); *Myers* D.P. Tr. 4279–80.) One of the services the partners offered was to seek financing for prospective lessees.

Sometime in mid-1978, Roy Student, the general sales manager of a company Rosenberg had contacted as a potential client, told Rosenberg that Herman Weiss, a Florida businessman who was Student's cousin, knew of a source of financing in the Middle East. Rosenberg telephoned Weiss, who confirmed that he had access to Arab oil money. Weiss told Rosenberg that he would try to arrange for financing for Transcom East, if Rosenberg would send $5,000 and a description of Transcom's proposed deals. When Rosenberg replied that he could not afford the cash advance, Weiss referred him to a friend in New York who might not require a cash advance: Mel Weinberg. (Sel. Comm. Hrg., Sept. 9, 1982, at 7–10 (testimony of William Rosenberg).)

Sometime before October 6, 1978, Rosenberg called Weinberg at Abdul Enterprises to schedule a meeting. The call was not recorded, and no FD 302 describing the conversation was ever prepared.

On October 6, 1978, at the Abdul Enterprises offices in Holbrook, New York, Rosenberg and Daniel Minsky met Weinberg for the first time.[111] Rosenberg testified that, when the meeting began, he "had no idea we were going to discuss any illegal transactions" or "offshore banks." [112] (*Id.*, at 12, 56.) That testimony is belied, however, by the recording of the October 6 meeting, which begins with Rosenberg's saying to Weinberg, "Everyone says for me to contact you. They say you have a need for some offshore (inaudible)." ([Deleted]) Futher, before having had that language read to him by the

---

[111] Rosenberg testified that he thought the meeting had occurred in August or September of 1978 (Sel. Comm. Hrg., Sept. 9, 1982, at 11–12 (testimony of William Rosenberg)), but the recording of the October 6 meeting plainly shows that meeting to have been the first one between Weinberg and the Transcom East partners. Early in the recording, Weinberg asked, "Which one is Rosenberg?" Rosenberg replied, "I am Rosenberg." Weinberg then stated, "What's your first name?" ([Deleted])

The FBI, too, at one point mistakenly identified the date on the first meeting. On February 16, 1979, the FBI's New York Field Office reported to FBI HQ that in *July* 1978 a "David Minski" had met Weinberg and had offered to sell fraudulent securities and that one week later his partner William Rosenberg had met Weinberg to finalize the deal. (*See* ([Deleted]) Such significant errors in chronology and in a suspect's name so near in time to the events being described most likely occurred because the FBI's Abscam operatives had failed to listen to the October 6 recording or had failed to communicate its contents to the person reporting to FBI HQ. Whichever of those failures explains the erroneous report to FBI HQ, the failure represents a deficiency in the management, supervision, and control of the investigation and further dramatizes the need for prompt, accurate transcription of recordings and prompt review of records or transcripts by operatives and supervisors.

[112] Offshore banks are banks outside the United States commonly used to facilitate the dissemination of fraudulent certificates of deposit and other securities.

Select Committee, Rosenberg testified that on October 6, 1978, he already had known what offshore banks were and "that one of the principal purposes of offshore banks was to conduct illegal transactions." (Sel. Comm. Hrg., Sept. 9, 1982, at 13 (testimony of William Rosenberg).) Even further, a later part of the October 6 recording has Minsky telling Weinberg, "I got two banks in the Virgin Islands. They ain't worth a plugged nickel, but they can write paper. They can manufacture paper faster than you got hair on your head." ([Deleted]) Thus, there can be no reasonable doubt that Rosenberg and Minsky met with Weinberg for the purpose of selling fraudulent securities and that Rosenberg testified falsely when he denied that fact.

The Select Committee similarly finds that Rosenberg inaccurately testified in the *Myers* post-trial due process hearing by stating that, after Weinberg had mentioned letters of credit at the October 6 meeting, Rosenberg had had to contact someone who could explain to him what a letter of credit was. (*See Myers* D.P. Tr. 4282–83.) As Rosenberg admitted elsewhere, he has a college degree in business science; took courses in finance, securities, economics, and business law; taught college economics; worked for several years as a representative and broker of the New York Stock Exchange; was familiar with the various forms of securities available on the market; and regularly read business periodicals such as *Forbes, Fortune,* and *The Wall Street Journal.* (Sel. Comm. Hrg., Sept. 9, 1982, at 4 (testimony of William Rosenberg).) He also was convicted of securities fraud in 1976. (*Myers* D.P. Tr. 4279.) It is virtually inconceivable that, with such a broad experience in the business and financial world, Rosenberg did not know in October 1978 what a letter of credit was.

The Select Committee similarly finds that Rosenberg inaccurately testified in the *Myers* post-trial due process hearing by stating that before October 6 his leasing business, Transcom East, "was a totally legitimate business." (*Id.* at 4281–82.) That testimony is belied by the recording of a conversation on November 16, 1978, among McCloud (Special Agent McCarthy), Weinberg, Rosenberg, and William Eden, one of the Transcom East partners. During that conversation Eden told Weinberg and McCloud that, in prior transactions arranged by Transcom East, the partnership had paid bribes to various New Jersey public officials, including Angelo Errichetti, Mayor of Camden, New Jersey. The corrupt connection between Errichetti and Transcom East was confirmed shortly thereafter, when Eden and Rosenberg introduced Errichetti to the Abdul Enterprises representatives to effectuate a bribe payment to him.

The Select Committee concludes that Rosenberg inaccurately testified in the foregoing respects in an attempt to create the false impression that, before October 6, 1978, he had been an innocent businessman and that, from October 6 forward, he had been entrapped by Weinberg's scheming.

At the October 6 meeting, having described why he needed offshore securities, Weinberg stated that he could use $100 million in such securities "right away." He told Rosenberg and Minsky that they would get a commission of seven per cent of the face value of the securities they produced. When the partners told him they wanted to borrow $100 million from Abdul Enterprises for their own purposes, he agreed to buy $200 million of fraudulent securities and to lend half of that to Transcom East. Finally, after further discussion, they all agreed that the partners would provide $300 million in fraudulent securities, with half to be loaned to Transcom East. ([Deleted])

When government attorneys interviewed Rosenberg on June 17, 1980, and he contended that Weinberg had participated in the production of the fraudulent securities, Rosenberg's story was that, shortly after October 6, Weinberg had given him a sample certificate of deposit and had told him that he, Weinberg, could get a batch printed from the sample. Rosenberg told the government attorneys that Weinberg had then had the securities printed and that Rosenberg had obtained the printed securities from Weinberg, had filled in the names and amounts, and had returned the completed documents to Weinberg. (Sel. Comm. interview of Stephen Spivack, Sept. 10, 1982). On January 16, 1981, in an interview by Special Agent McCarthy, William Eden, Rosenberg's partner in Transcom East, supported Rosenberg's story by saying that, sometime between October 6 and October 20, 1978, Rosenberg had told him that Weinberg had given Rosenberg samples of certificates of deposit and had offered to use the samples to have a batch of fraudulent securities printed. ([Deleted])

That version, however, contradicts Rosenberg's subsequent sworn testimony in the *Myers* post-trial due process hearing and before the Select Committee. In both of the latter instances, Rosenberg testified that, after the October 6 meeting, he had obtained, from a man named Herb Shaffron, a sample of a fraudulent letter of credit and had given it to Weinberg, who had then taken the sample to have a batch of fraudulent certificates of deposit and letters of credit printed. (*See* Sel. Comm. Hrg., Sept. 9, 1982, at 7-33 (testimony of William Rosenberg); *Myers* D.P. Tr. 4282-84.)

The events leading to the change in Rosenberg's story as to who provided whom the sample security demonstrate the purposeful nature of Rosenberg's mendacity. The relevant events began shortly after the June 17, 1980, interview at which Rosenberg first told the government attorneys, including Stephen Spivack, that Weinberg had provided both the sample and the $1.2 billion in fraudulent securities made from the sample.

Spivack called several FBI agents to try to find one who had had substantial experience with fraudulent securities from offshore banks and who could help investigate Rosenberg's contentions. One of the agents Spivack called identified an FBI special agent in New York, Michael Shea, who was very knowledgeable about fraudulent certificates of deposit because of his participation in a recent investigation of fraudulent certificates of deposit of the Merchants & Shipowners Bank.

Spivack called Shea, who informed him of an astounding coincidence; namely, on October 23, 1978, Shea had received a call from a man named Herb Shaffron, who had said that he had been contacted by a William Rosenberg, who wanted to obtain fraudulent securities to use to transfer money out of the Middle East. Shaffron, who had met Shea in connection with Shea's investigation of the Merchants & Shipowners Bank, had said that he was calling Shea to find out whether it would be legal to provide Rosenberg with fraudulent securities, given that they would not be used within the United States. Shea had told Shaffron that transfer of the securities would be illegal and should not be made, but he had asked Shaffron to meet with Rosenberg under FBI surveillance. Shaffron had agreed. Shea had recorded their entire conversation. On October 24, 1978, the FBI had taken photographs of Rosenberg and Shaffron meeting at a New York diner.[113]

Armed with the information provided by Shea, Spivack realized that Rosenberg may have lied on June 17, 1980, by telling Spivack that Weinberg had provided the sample from which the fraudulent securities had been made. Spivack could not be sure, however, because, when Shaffron had called Shea on October 23, 1978, Shaffron had indicated that he had not given any securities to Rosenberg and was seeking advice as to whether he could legally do so.

Spivack than recalled that, at the interview on June 17, 1980, Rosenberg had given him a handwritten list of names and telephone numbers on a page from Rosenberg's personal telephone book. Shaffron's name appeared on the list in the midst of several names Spivack knew to be connected to Abscam. Accordingly, on July 3, 1980, Spivack asked Rosenberg to identify the various individuals; when he came to Shaffron, Rosenberg said, "Oh, he's just some guy. He had nothing to do with any of this." At that point, it was clear that Rosenberg was lying. Without letting Rosenberg know what he had learned from Shea about Rosenberg's dealings with Shaffron, Spivack told Rosenberg that the FBI was going to dust the fraudulent securities for fingerprints and that he was sure he would get results.

Several days later, Spivack recalled that FBI documents showed that on October 20, 1978, Rosenberg's partners William Eden and Daniel Minsky had met with Weinberg and Gunnar Anderson (Special Agent Gunnar Askeland) in Florida and had given them a letter of credit of the Merchants & Shipowners Bank with the handwritten word "sample" printed across it. Spivack reasoned that, because Shaffron had been involved in Special Agent Shea's investigation of that very bank, it was likely that Shaffron had given the sample to Rosenberg, who had given it to Minsky, who had given it to Weinberg and Anderson for approval.[114] Still, Shaffron had not yet admitted that he had given Rosenberg a sample security.

Therefore, on July 17, 1980, Spivack met with Shaffron to discuss the matter. When shown the sample that Minsky and Eden had provided on October 20, 1978, Shaffron admitted that the word "sample" was in his handwriting and that he had given the document to Rosenberg. This admission made it quite clear that Rosenberg had forewarned Shaffron of Spivack's plan to take fingerprints off the securities (a mere ploy on Spivack's part, since it was unlikely that identifiable prints could be obtained) and that Shaffron had decided he should not take the risk of lying to Spivack. It was also clear that Rosenberg had lied on June 17, 1980, and on July 3, 1980, in his meetings with Spivack: Rosenberg knew Shaffron, knew him in a Abscam context, and had obtained a sample fraudulent letter of credit from him on or before October 20, 1978.

---

[113] Spivack's fortuitous call to Shea sharply demonstrates the absence of communication among various FBI offices and between the FBI and federal prosecutors. On February 13, 1979, Special Agent Barbara Wertz sent a memorandum to the Miami Special Agent in Charge regarding Rosenberg, Minsky, Constanzo [sic], First National Bank of Teheran, and Merchants & Shipowners Bank. The memorandum stated that Special Agent Michael Shea would be sending Miami a tape recording of a conversation between one of those men and two other individuals. The memorandum also stated that Shea would send some photographs and that Shea believed the materials would assist in the development of the case against Rosenberg, Minsky, and Costanzo [sic]. The memorandum concluded with a statement that Wertz would discuss the matter with Special Agent Gunnar A. Askeland. (*See Kelly* Def. Trial Ex. 22.)

[114] Spivack could have added to the basis for his hypothesis by noting that, when Rosenberg and Minsky had first told Weinberg, on October 6, 1978, that they would provide fraudulent securities, Weinberg had demanded that they give him a sample, with "sample" written on it, for his approval. Further, in the October 6 conversation, Minsky had said that he knew of two offshore banks in the Virgin Islands; and the Merchants & Shipowners Bank, on which the October 20 sample was drawn, was a Virgin Islands bank.

One question that remained to be answered was, Why had Shaffron called Shea on October 23, 1978, to ask if he, Shaffron, could legally give Rosenberg a sample of a fraudulent letter of credit, since Shaffron had given Rosenberg the sample on or before October 20? The answer to that question, too, seems to lie in the events surrounding the meeting between Minsky and Eden and Weinberg and Anderson (Askeland) in Florida on Friday, October 20, 1978.

FBI documents show that, shortly after that meeting, on the same day, Special Agent Askeland had received from FBI Supervisor John Good teletyped instructions to cancel the meeting planned for the following day between Askeland and Weinberg and the men from whom they intended to obtain fraudulent securities. Good was concerned that the FBI either would have to arrest the individuals who provided the securities or would have to pay the promised commission. The former option was undesirable, because the publicity might blow the operation's cover; the latter option was undesirable because of the huge amount of money that would have to be given to the criminals.

To extract the FBI from that situation, Special Agent Askeland created a sham teletype to Weinberg, ostensibly from Abdul Enterprises security personnel, warning him that FBI agents were in the vicinity and would arrest everyone involved if the securities were transferred. On Saturday, October 21, Weinberg showed the bogus teletype to Minsky and Eden, who immediately fled to New York. Minsky and Eden promptly told Rosenberg (*Myers* D.P. Tr. 4298–300), who must have then told Shaffron, who, realizing that he might be in trouble, called Special Agent Shea on the next business day, Monday, October 23, to try to ascertain whether he was in trouble.

In the fall of 1980, after Shaffron told Spivack that Rosenberg had received the sample from Shaffron, Spivack again talked to Rosenberg. In the middle of that conversation, Rosenberg abruptly changed the topic and stated, "Steve, do you remember the sample LC [letter of credit] that Herb Shaffron gave me?" Spivack replied that Rosenberg had never told him about such a sample, and Rosenberg lamely stated, "Oh, I thought I told you. I must have told my own lawyer." He also "explained" that he had failed to mention Shaffron's role during the interviews with Spivack on June 17, 1980, and on July 3, 1980, because Shaffron's Abscam participation had "completely disappeared" from his mind. From that point in time, Rosenberg's story became that Shaffron had provided the sample letter of credit to him, that he had provided the sample to Weinberg, and that Weinberg had had the batch of securities printed.

Rosenberg's second version is no more truthful than was his first version. The evidence overwhelmingly shows that he never gave Weinberg a sample letter of credit of the Merchants & Shipowners Bank and that Rosenberg and his partners, not Weinberg, produced the securities attributed to Rosenberg and his partners.[115]

First, to believe Rosenberg's second version, one must be willing to ignore the series of lies that Rosenberg told in connection with his first version and the series of lies he told under oath concerning his first meeting with Weinberg. Second, there is no evidence to corroborate Rosenberg's second version.

Third, Rosenberg testified that he had given to Weinberg the one letter of credit he had received from Shaffron and on which Shaffron had written "sample." Rosenberg also testified that Weinberg had used that sample to produce the fraudulent securities. (*See* Sel. Comm. Hrg., Sept. 9, 1982, at 26–29 (testimony of William Rosenberg).) In fact, however, the sample letter of credit given to Rosenberg by Shaffron was given to Weinberg and Anderson (Special Agent Askeland) by Minsky and Eden on October 20, 1978. The same sample could not have been in two different places at the same time.

Fourth, as Rosenberg would have it, Weinberg offered to pay him, a total stranger, seven per cent of $1.2 billion in fraudulent securities merely to type in names and amounts and to return the securities to Weinberg. Thus, Rosenberg would have it that Weinberg promised a total stranger $84 million for a few hours of typing and that Rosenberg, an experienced businessman, believed Weinberg. (*See id.* at 16–18.) Moreover, Rosenberg expects it to be believed that Weinberg, who Rosenberg admitted was not a generous man (*see id.* at 32), simply offered that astronomical sum without any negotiation (*see id.* at 32–33) and that Rosenberg, when offered such a sum, did not make even a token effort to obtain either a down payment or a greater commitment. These contentions are not merely unlikely; they are incredible.

Fifth, at the October 6, 1978, meeting at which Rosenberg and Minsky first agreed to provide securities from an offshore bank, Minsky said he had two such banks that "can manufacture paper faster than you got hair on your head." ([Deleted]) Yet, Rosenberg would have it that Weinberg later, inexplicably, decided to print the fraudulent securities himself. Since Minsky and Rosenberg had told Weinberg they could get the securities manufactured, since Minsky and Rosenberg had obtained the sample, and since Rosenberg could offer no explanation for Weinberg's abrupt decision to produce the securities himself, it seems highly unlikely that such a decision in fact occurred.

Sixth, Rosenberg testified that all he had given Weinberg was the one sample letter of credit. But he also testified that Weinberg then had given him a batch of blank certificates of deposit and a batch of blank letters of credit on the same bank. (*See* Sel. Comm.

---

[115] In addition to the evidence described in the above text, Weinberg testified that Rosenberg never gave him a sample letter of credit, (*See Myers* D.P. Tr. 4408–09.) Because of Weinberg's lack of credibility, the Select Committee does not rely at all on his testimony.

Hrg., Sept. 9, 1982, at 35 (testimony of William Rosenberg).) Thus, Rosenberg would have it that Weinberg either performed some sort of alchemy, turning a sample letter of credit into certificates of deposit (documents of a different size, shape, and overall appearance that simulated real certificates of deposit of the same bank) or for some reason, after having asked Rosenberg to get a sample of one security, then went to the trouble of finding another type of security from the same offshore bank.

Seventh, Rosenberg's arithmetic sharply conflicts with the facts established by documentary evidence. Rosenberg testified that Weinberg had given him blank securities only once and that on that occasion Weinberg had given him 600 letters of credit worth "*exactly* $600 million" and 600 certificates of deposit worth $600 million. (*Id.* at 36.) He then contradicted himself by stating, "There were more of the certificates than there were of the letters of credit. . . ." (*Id.*) He also confirmed that each of the 600 letters of credit and each of the 600 certificates of deposit was in a $1 million denomination and that he had counted the 1,200 documents as they were typed. (*Id.* at 36–38.)

In fact, however, the letters of credit and the certificates of deposit that Weinberg provided to the FBI and attributed to Rosenberg are in two denominations: half of each type of document are in $1 million denominations, and half of each type of document are in $500,000 denominations. (*See Kelly* Weisz Def. Trial Exs. 14, 24, 25.) Further, the recording of a conversation between Weinberg and Rosenberg on October 25, 1978, has Weinberg stating, in response to Rosenberg's question as to what denomination the securities should be, that half should be for a million and half should be for half a million: "That's $500,000 and one million." Rosenberg replied, "Okay, now." ([Deleted])

Even further, in the recording of a conversation between Weinberg and Rosenberg on October 30, 1978, Rosenberg, in discussing his progress on making the securities, says, "Now, you know that I have doubled the rate. I will have . . . ." Weinberg interrupts and says, "Six. I know, 600." ([Deleted]) When asked by the Select Committee how he could have doubled the number of securities without producing them himself, since he testified that Weinberg had given him only one batch of blanks, Rosenberg flatly contradicted his earlier testimony by stating that Weinberg probably gave him more documents than he originally needed and that he, Rosenberg, "never counted the amounts. I know when I ran short of them, but I never counted the amount. . . ." (Sel. Comm. Hrg., Sept. 9, 1982, at 43 (testimony of William Rosenberg).) He then added a third version, stating that he counted them "after they were produced." (*Id.*)

Eighth, Rosenberg testified that "we used a stamp on them, and when we got to 600, I knew that was the completion of one for the letters of credit and the others for the certificates of deposit." (*Id.*) This repeated his earlier testimony, hardening his contention that he had returned to Weinberg 600 letters of credit and 600 certificates of deposit, for a total of 1,200 documents. The securities actually produced, however, had to, and did, number more than 1,200 in order to have a total face value of $1.2 billion, the sum that Rosenberg has admitted was the total face value of the securities he gave to Weinberg. The largest denomination of the securities produced was $1 million, and it would take exactly 1,200 securities of that denomination to achieve a total of $1.2 billion; but half of the securities provided by Rosenberg had a face value of only $500,000. In fact, there were 1,800 documents.

Finally, in a recorded conversation on October 21, 1978, between Rosenberg and Weinberg in which they discussed the fraudulent securities being prepared by Rosenberg, the following dialogue occurred:

> ROSENBERG: I can supply what you need and I can do it without—wait a minute. (pause) Mel, I can supply what you need, and I have backup all the way on a variety of things, so that I can turn over $300 million LCs and follow up a week to ten days behind it with another $300 million in CDs.
>
> WEINBERG: The same bank?
>
> ROSENBERG: I believe it to be the same bank, or I'll use another one.
>
> WEINBERG: Another one is better.
>
> ROSENBERG: Then I'll get two, because I have the connections for this kind of thing, and I see no problem. ([Deleted])

This shows Rosenberg stating that he can "supply" the documents and that he can get securities on different banks, if necessary. Since the name of the bank is printed, not typewritten, on the certificates of deposit and on the letters of credit, Rosenberg could not have offered to change the name of the bank if, as Rosenberg would have it, Weinberg had provided the securities with everything except the denominations, the interest rates, and the names of the sheiks. (*See* Sel. Comm. Hrg., Sept. 9, 1982, at 30–31, 37–38 (testimony of William Rosenberg); *Myers* D.P. Tr. 4285.)

3. The Errichetti Securities Transaction

Angelo Errichetti testified before the Select Committee on September 15, 1982. The following description of the events surrounding the incident on March 8, 1979, in which Errichetti handed Tony DeVito (Special Agent Anthony Amoroso) 87 fraudulent Chemsave certificates of deposit, each having a face value of $5 million, is taken from that testimony, from documents of the FBI and of other components of the Department of Justice, from Abscam tape recordings of conversations in which Errichetti participated, and from interviews and briefing sessions with FBI officials and special agents, including Special Agents John M. McCarthy, Anthony Amoroso, and Myron Fuller.

When Errichetti testified before the Select Committee on the morning of September 15, 1982, and was asked whether he had ever obtained, or even had handled, fraudulent certificates of deposit, he answered that the only fraudulent certificates of deposit he had ever handled had been handed to him by Melvin Weinberg. In particular, he testified that, on some date after January 20, 1979, Weinberg had handed him "a stack of CDs" that were blank and had asked him to "type them up." (Sel Comm. Hrg., Sept. 15, 1982, at 92–93 (testimony of Angelo J. Errichetti).) Errichetti could not recall how many securities Weinberg had given him, but the total face value of the stack was $485 million.

Errichetti testified that he had given the securities to his secretary, Dani Anise, to type in the necessary information, and that it had taken her approximately half an hour to finish the task. He then testified that he had returned the completed securities to Weinberg either the same day or the next day. (*Id.* at 95.)

Having heard that testimony from Errichetti, the Select Committee confronted him with contemporaneous documents that conflicted with his story. First, the Select Committee brought to Errichetti's attention the recording of a meeting on March 8, 1979, in which the participants had been Errichetti, Tony DeVito (Special Agent Anthony Amoroso), and Weinberg. That recording had Errichetti stating to the others that the certificates of deposit had been typed and signature stamped. When the Select Committee asked what "signature stamped" meant, Errichetti answered that he had taken the signature stamp of Charles Shoemaker, City Engineer of Camden, New Jersey, and had stamped Shoemaker's name onto each of the securities. (*Id.* at 100-01.) Thus, Errichetti implicitly admitted that his initial testimony, that Weinberg had asked him only to type in some information because Weinberg's secretary allegedly was "not available," was false.

Second, the Select Committee brought to Errichetti's attention the recording of a meeting at the Abdul Enterprises offices on February 12, 1979, in which the participants had been Errichetti, Weinberg, DeVito, and McCloud. The Select Committee read to Errichetti the following excerpt from that recording:

> DEVITO: Did he say how good this stuff is? I mean, you know, what kind of quality?
>
> ERRICHETTI: Excellent.
>
> DEVITO: Yeah, what kind of paper do they use?
>
> ERRICHETTI: Good.
>
> DEVITO: That's probably the biggest problem is the paper on that stuff.
>
> ERRICHETTI: He told me it was guaranteed. Shows how good it is.
>
> DEVITO: Okay. That would be ideal if we could get that. * * *. As long as you got something to exchange for it and it looks like these, they're not gonna check. ([Deleted])

The Select Committee asked Errichetti if the quoted conversation was a discussion of certificates of deposit, and he admitted that it was a discussion of either certificates of deposit or counterfeit money. He then admitted that he had never given Weinberg any counterfeit money, and he also offered no explanation of how the last quoted statement by DeVito could relate to anything other than securities.[116] (Sel. Comm. Hrg., Sept. 15, 1982, at 95-96 (testimony of Angelo J. Errichetti).)

---

[116] When the Select Committee interviewed Special Agent Amoroso and asked him about the excerpt from the February 12, 1979, recording quoted above, he readily identified the topic of discussion as having been certificates of deposit. He also noted that, in a later portion of the same recording, the participants had discussed counterfeit money. A teletype sent to FBI HQ on February 12 says, however, "It was understood by the participants of this conversation that the 'paper' referred to was counterfeit money." ([Deleted])

The Select Committee reminded Errichetti that he had testified that DeVito had been involved in all of Weinberg's plans to defraud the sheiks. The Select Committee then asked Errichetti why, at a meeting attended only by the three persons conspiring in all of the shady transactions, DeVito was asking Errichetti about the quality of paper of the documents that, according to Errichetti, DeVito must have known had been provided by Weinberg. Errichetti had no coherent answer. (*See id.* at 96–97.) Similarly, the Select Committee noted that, if Errichetti's testimony was truthful, he should have responded to DeVito's question about the quality of the paper by saying, "What are you talking about, Tony? Mel gave me these things to fill out." Errichetti admitted that his actual response on the recording was not of that nature, and he lamely stated, "I agree with you, . . . hindsight is 20–20."

Third, the Select Committee reminded Errichetti of his testimony that Weinberg had said he needed the securities typed "as quickly as possible" because there was "a time frame problem" and that Errichetti had managed to get the securities typed in about a half hour. (*Id.* at 92–93.) The Select Committee then brought to Errichetti's attention the fact that the March 8, 1979, recording indicated that he had given a batch of fraudulent certificates of deposit to Tony DeVito (Special Agent Amoroso) on that date, more than 20 days after the February 12 meeting in which DeVito, Errichetti, and Weinberg had discussed the certificates of deposit that Errichetti had then been preparing.[117] When the Select Committee asked him whether a 20-day hiatus was consistent with the urgency to which he testified, Errichetti weakly replied, "I do not know what they consider urgent in regard to less than a month, less than a day, I am only carrying out instructions. I do not know what their time frame is, as far as they are concerned." (*Id.* at 99.)

That response and the documents proved beyond reasonable doubt that Errichetti had lied when he had first described the securities transaction. In that initial testimony, Errichetti unequivocally had stated that he had returned the completed securities to Weinberg on the "same day or the next day." (*Id.* at 98.) When confronted with the contemporaneous recordings, however, he implicitly admitted that he had taken more than 20 days either to complete the securities or, once they had been completed, to transfer them. Further, in his initial testimony Errichetti unequivocally had stated that he had given the securities to Weinberg. (*Id.*.) The contemporaneous documents show, however, that he in fact gave the securities to DeVito and Weinberg.

Because Errichetti's morning testimony before the Select Committee was so plainly false, the Select Committee's counsel spoke to Errichetti's attorney during the lunch recess and asked him to caution his client about the possible consequences of giving perjurious testimony. The Select Committee's counsel observed that Errichetti's testimony had been suspect with respect to several topics, but that the testimony with respect to the fraudulent securities had been particularly incredible.

---

[117] In addition, on March 8, 1979, Special Agent Amoroso reported that on that date Errichetti had given him a brown attaché case containing 87 fraudulent certificates of deposit drawn on the Chemical Bank, made out to Yassir Habib for $5 million each, and dated February 3, 1979. ([Deleted])

Immediately after the recess, the Select Committee asked Errichetti if the name Frank Pulini meant anything to him. The reason for the question was that FBI documents, including recordings of conversations in which Errichetti had participated, showed that Errichetti had told Weinberg and DeVito in early 1979 that Pulini was the man who was manufacturing the fraudulent certificates of deposit. (*See* [Deleted]) Thus, those documents provided further strong evidence that Errichetti had lied in his morning testimony when he stated that Weinberg had given him the securities.

Errichetti replied that he did know Frank Pulini. When the Select Committee asked Errichetti whether he had ever gone to Pulini to ask him to produce fraudulent bank securities, he admitted that he had. He stated that, sometime in the spring of 1979, Weinberg had given him some bank documents and had asked him to have them "reprocessed or reproduced with the proper paper," and that he, in turn, had assured Weinberg "that it could be done through a gentleman friend, this Mr. Pulini, who had a printer friend." (*Id.* at 110.) This testimony flatly contradicted Errichetti's morning testimony that "the only CDs I ever got were handed to me by Mr. Weinberg." (*Id.* at 77.)

Errichetti's afternoon testimony is, however, fundamentally consistent with the FBI documents, with Weinberg's testimony on this issue, and with Special Agent Amoroso's description of the relevant events. Amoroso informed the Select Committee that on February 7, 1979, Weinberg, in Amoroso's presence, had given Erichetti a blank certificate of deposit to use to manufacture a batch of fraudulent certificates of deposit. Also, on March 8, 1979, Amoroso reported that on that date Errichetti had given him and Weinberg fradulent certificates of deposit drawn on the Chemical Bank. Similarly, on March 11, 1979, Special Agent Myron Fuller reported that on that date Weinberg had told him that he had previously given Errichetti a Citibank certificate of deposit and a Chemical Bank certificate of deposit and that Errichetti subsequently had given Weinberg additional copies of those securities that Errichetti had had printed. (Myron Fuller FD 302, Mar. 11, 1979, *Myers* D.P. Ex. 85.) Finally, the recordings of the February 12 and March 8 conversations suggest that Weinberg did give Errichetti some documents in early February, that Errichetti did go to Frank Pulini to have fraudulent certificates of deposit printed, and that Errichetti gave those securities to Amoroso and Weinberg on March 8, 1979. (*See also* [Deleted])

Accordingly, the Select Committee concludes that Errichetti's contention that in early 1979 Weinberg gave him a batch of fraudulent certificates of deposit with a total face value of $485 million and asked him to type in some information is entirely false. The Select Committee also concludes that on or about February 7, 1979, Weinberg, with the FBI's knowledge and approval, gave Errichetti one or more sample certificates of deposit, that Errichetti subsequently had Frank Pulini use one of those samples to print fraudulent certificates of deposit with a total face value of $435 million, and that Errichetti transferred those securities to Amoroso and Weinberg on March 8, 1979.

4. The Askeland FD 302 of January 26, 1979

One disturbing aspect of the circumstances surrounding the FBI's dealings with Errichetti regarding fraudulent securities arises out of a report prepared by Special Agent Gunnar A. Askeland of the FBI's Miami Field Office on January 26, 1979. Askeland reported that on that date Weinberg had told him about a telephone call that Weinberg had received at his Florida home, at three o'clock that morning, from Errichetti. According to the report, Errichetti had told Weinberg to meet him immediately at the Sheraton Inn, Palm Beach Lakes Boulevard, West Palm Beach, Florida. Weinberg had gone to meet Errichetti at 7:00 a.m. at room 608 of that hotel, where Errichetti had then given him a Chemsave certificate of deposit drawn on the Chemical Bank.[118] (*See* [Deleted])

When federal prosecutors working on Abscam asked Weinberg in 1980 about Asheland's January 26, 1979, report, Weinberg said that Askeland's report erroneously stated the relevant times and place of the events of that date. Specifically, Weinberg claimed that he had met Errichetti at the airport, later than 7:00 a.m., on January 26, 1979. (*See* [Deleted]) When Weinberg testified before the Select Committee, he again aserted that Askeland's report erroneously stated the relevant times. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 216–17 (testimony of Melvin C. Weinberg).) When Errichetti testified before the Select Committee, he denied ever having called Weinberg at 3:00 a.m. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 73 (testimony of Angelo J. Errichetti).) He also denied having given Weinberg any certificates of deposit on January 25 or January 26, 1979 (*Id.* at 74–76); but he admitted that he had met Weinberg in Florida on one of those dates (*Id.* at 71). In addition, on November 17, 1982, the Manager of the Sheraton Inn on Palm Beach Lakes Boulevard in West Palm Beach, Florida, informed the Select Committee that room 608 of that hotel is now, and in January 1979 was, a conference room, not a guest room.

Clearly, either Special Agent Askeland misstated several material facts in his January 26, 1979, report of events reported to him by Weinberg on that very day; or Weinberg lied to Askeland on that day about what had occurred; or Weinberg told Askeland the truth, Askeland accurately reported it, and Weinberg later changed his story for some reason. Askeland informed the Select Committee that he was certain that he had accurately reported what Weinberg had told him. Further, the FBI has confirmed to the Select Committee that it still has possession of the Chemsave certificate of deposit that Weinberg gave to Askeland on January 29, 1979.

There are even more problems surrounding these events. Until November 11, 1980, federal prosecutors from New Jersey and from Washington, D.C., were erroneously led to believe that the fraudulent certificates of deposit produced by Errichetti on March 8, 1979, had been a true recovery by Weinberg and Amoroso—that is, that Weinberg had not had anything to do with the creation of those securities. That belief was supported by Askeland's January 26, 1979, report, by the absence in Amoroso's March 8, 1979, report of any indication that Weinberg had provided Errichetti the blank from which the securities transferred by Errichetti that day had been produced, by the absence of any report indicating that Weinberg or Amoroso had ever given Errichetti a bank security, and by the fact that the bank on which the securities that Errichetti had transferred on March 8 were drawn was the same bank, Chemical Bank, referred to in Askeland's January 26, 1979, report.

---

[118] The Askeland report was not the first one connecting Errichetti to fraudulent securities. On January 9, 1979, Special Agent McCarthy reported that Weinberg had told him that Errichetti had informed Weinberg that day that Errichetti knew a person named "Frankie" who could print fraudulent certificates of deposit. ([Deleted]) On January 25, 1979, McCarthy reported that Weinberg had telephoned him that day and had said that Errichetti had telephoned earlier that day and again had said that he could obtain fraudulent certificates of deposit. ([Deleted])

On November 11, 1980, purusant to a court order, one of the Washington, D.C., federal prosecutors, Stephen Spivack, told the FBI to provide him with all documents from the New York and Miami Field Offices pertaining to certificates of deposit and Rosenberg and Weinberg. Among the documents provided to him pursuant to the request was Special Agent Fuller's March 11, 1979, report about Weinberg's having told him that day that he, Weinberg, had given Errichetti the certificate of deposit that Errichetti had used to produce the securities he later had given to Weinberg. None of the Abscam federal prosecutors from Washington, D.C., or from New Jersey had previously known about the Fuller report.

Because the Fuller report conflicted with the understanding that those prosecutors had been given regarding the origin of the securities transferred by Errichetti on March 8, 1979, they confronted Weinberg with the report. Weinberg denied having told Fuller that he had given Errichetti a certificate of deposit, thus appearing to be trying to convince the prosecutors that Errichetti had produced the securities without Weinberg's assistance. Shortly thereafter, however, on February 16, 1981, at the post-trial due process hearing before Judge Pratt in the *Myers* case, Weinberg testified that the Fuller report was correct, that he, Weinberg, had received a Chemsave certificate of deposit from Rosenberg and had given it to Errichetti, and that Errichetti had used that document to produce the securities transferred on March 8, 1979. (*See United States* v. *Myers,* 527 F. Supp. 1206, 1234 (S.D.N.Y. 1981).

The Select Committee could offer a variety of theories that might explain who was mistaken at which point in time, who was lying at which point in time, and what actually happened. The testimony and the documents contain so many contradictions, however, that any such theory would be of little value. The principal conclusion that the Select Committee does draw from these events is that neither Melvin Weinberg nor Angelo Errichetti can be relied upon to describe any material event accurately. Because of a combination of mendacity and faulty memory, each man's testimony, unless corroborated by other evidence, is wholly unreliable.

This morass provides further evidence of the importance of careful reporting and of requiring informants to record all conversations with suspects whenever that can be done without undue risk of harm or of blowing the cover of the operation. Weinberg should have recorded the telephone conversations with Errichetti that led to Errichetti's trip to Florida on January 25, 1979; the call from Errichetti in which he asked Weinberg to meet him; and the meeting with Errichetti.[119]

5. The Unsatisfactory Nature of the FBI's Practices Regarding Weinberg's Compensation for the Rosenberg Securities

The reporting of the FBI special agents in connection with the Rosenberg fraudulent securities was, as noted at the beginning of this section, substantially deficient, in that neither FD 302 reports nor memoranda describing the circumstances surrounding the receipt of either batch of securities were ever prepared. Moreover, the limited information that was provided by FBI HQ was incomplete, misleading, and, in at least one material respect, erroneous. The Select Committee finds investigative deficiencies of such a basic and easily avoided nature to be inexcusable, especially in a major undercover operation.

On November 29, 1978, Special Agent Gunnar Askeland reported to FBI HQ that on November 20, 1978, he had recovered from George Cannon letters of credit drawn on the Merchants & Shipowners Bank with a face value of $300 million. In fact, however, the Select Committee discovered by studying other documents that Cannon actually produced $300 million in certificates of deposit drawn on the First National Bank of Antigua. The securities referred to in Askeland's report were one-half of the batch provided by Rosenberg on November 20, 1978. When the Select Committee suggested this to be the case, Assistant United States Attorney Spivack confirmed that he, too, had independently reached that conclusion in trying to understand what had happened. Thus, either in marking or in storing the contraband items received from Cannon and Rosenberg, Askeland somehow confused them.

The confusion was compounded on February 9, 1979, when the Miami Field Office reportd to FBI HQ about securities it had recovered from Rosenberg in 1978. The only securities mentioned were certificates of deposit with a face value of $300 million. The absence of any mention of the letters of credit with a face value of $300 million that Rosenberg had provided when he had provided the certificates of deposit strongly suggests that those letters of credit were still being erroneously attibuted to Cannon.

In addition, at least one instance occurred in which FBI HQ was induced to pay Weinberg a bonus in part on the basis of incomplete and misleading information. On May 14, 1979, the New York Field Office submitted a request for a $15,000 bonus for Weinberg, primarily on the basis of Weinberg's efforts with respect to the investigation of Kenneth MacDonald. Such requests were by no means routinely granted in the course of Abscam. Thus, for example, on February 16, 1979, the New York Field Office requested a $15,000 lump sum for Weinberg in connection with a specified incident, and FBI HQ approved only $5,000; on November 3, 1978, FBI HQ rejected a requested bonus of $10,000 for Weinberg, but approved $2,500; on October 24, 1979, FBI HQ rejected a request for $10,000 for Weinberg's "resettlement expenses," but approved $6,000.

---

[119] In addition, on April 4, 1979, the New York Abscam operatives sent a report to FBI HQ purporting to describe the Abscam events from November 1978 to April 1979. The January 26, 1979, meeting of Weinberg and Errichetti and the transfer of the Chemsave certificate of deposit are not mentioned in the report. They also are not mentioned in any other contemporaneous New York document. It therefore seems that Miami simply failed to inform New York of the event—another instance of the failure of communication of an important event between the FBI's offices and between the FBI and the prosecuting attorneys.

To bolster the May 14, 1979, request, therefore, the Miami Field Office sent a teletype on May 21 stating that Weinberg had recovered $1.9 billion in fraudulent securities, thereby preventing losses. That figure included the $600 million in securities provided by Rosenberg, part of which the Miami Field Office had reported on February 12, 1979. In that February 12 report, Miami claimed that Weinberg's recovery took the fraudulent securities out of circulation and thereby prevented large losses to United States banks.

In fact, however, as discussed above, other contemporaneous FBI documents show that Rosenberg had his securities produced at Weinberg's request and that Weinberg provided Rosenberg the names, denominations, and interest rates. Thus, the securities would not have existed had the Abscam informant not caused them to be produced, and no bank was ever in any danger of being defrauded. The same appears to be true with respect to most of the securities referred to in the May 21, 1979, teletype. Moreover, neither Miami nor New York informed FBI HQ that the Strike Force attorneys had told Senior Supervisor John Good that the securities transactions were of questionable prosecutability.

Not having been fully or accurately informed, FBI HQ agreed to pay Weinberg the requested $15,000 lump sum payment, giving the following explanation:

> CID agrees with SAC, Brooklyn Queens and SAC, Miami that informant's actions resulted in significant accomplishments and are worthy of a $15,000 lump sum payment. In the attached Brooklyn Queens letter dated May 14, 1979, and Miami teletype dated 5/21/79, *source has been credited with $1,938,300,000 preventive economic loss,* a $100,000 bribe to the vice chairman of the New Jersey Gaming Commission and critical information concerning Congressman John Jenretti, [sic] Democrat from South Carolina. In addition, this informant has provided information in the matter captioned, "Goldcon." (*Myers* D.P. Ex. 60; *Kelly* Weisz Def. Trial Ex. 32 (emphasis added).)

The Select Committee concludes that FBI HQ was misinformed and misled and probably would not have granted the full $15,000 had accurate information been furnished. The Select Committee categorically rejects the FBI's contention, made on November 5, 1982, that "officials at FBI Headquarters were provided sufficient information to justify the payment." (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr., at 4 (Nov. 5, 1982).)

D. MISREPRESENTATIONS BY WEINBERG REGARDING SPECIAL AGENT DENEDY

One incident in particular demonstrates the degree to which Weinberg was able to avoid effective supervision by the FBI. The incident began on January 29, 1979, when FBI Special Agent Margot Denedy's photograph appeared on the front page of several newspapers, including *Newsday* and the *Philadelphia Inquirer*, as an agent who had participated in the arrest of an airplane hijacker at JFK Airport. Before that date, Denedy had played an Abscam undercover role as Margo Kennedy, an Abdul Enterprises employee.

On February 5, 1979, Weinberg telephoned Special Agent McCarthy and reported that he had received telephone calls on January 31, 1979, from middlemen William Rosenberg, William Eden, and Angelo Errichetti, each of whom had claimed to have seen the photograph and to have feared that it was of Kennedy. (*See Kelly* Def. Trial Ex. 12.) Weinberg told McCarthy that he had succeeded in convincing the three middlemen that the photograph was not of Kennedy. Despite warnings from McCarthy about the risk of physical danger, Weinberg agreed to attend a meeting with Errichetti that had been scheduled for February 7, 1979, in Atlantic City. Weinberg said that he would take the risk in order to ensure that Errichetti had believed Weinberg's assurances about Kennedy. (*See Kelly* Weisz Def. Trial Ex. 30.)

After the successful conclusion of that meeting, the FBI's New York Field Office requested approval of a $15,000 lump-sum payment to Weinberg, in large part for his having "reinstate[d] the credibility [of Abscam] . . . at tremendous personal sacrifice." (*Id.*) On April 9, 1979, FBI HQ approved a lump-sum payment of $5,000, specifically on the basis of this incident. (*See Myers* D.P. Ex. 84.)

It is apparent from Weinberg's testimony in court proceedings and before the Select Committee that he fabricated his report to McCarthy of a telephone call from Errichetti. Further, the Select Committee concludes that Weinberg probably invented the entire event in a successful effort to profit financially by defrauding the FBI.

Weinberg has admitted that he never received a telephone call from Errichetti concerning the Denedy photograph and has denied having told McCarthy that he had received such a call. (*See Kelly* Trial Tr. 1764; *Myers* D.P. Tr. 4362; Sel. Comm. Hrg., Sept. 16, 1982, at 75 (testimony of Melvin C. Weinberg).) Weinberg has claimed that McCarthy erred, but he has offered no plausible explanation for the purported error. (*See id.*) McCarthy and Good have confirmed that Weinberg had told them that he had received a call from Errichetti about Denedy. (*See Kelly* Trial Tr. 3442, 3623–24, 3683–89.)

Weinberg has maintained, however, that McCarthy accurately reported a conversation Weinberg had had with Rosenberg that caused the FBI to worry that Errichetti, too, might have seen the photograph. (*See id.* at 1763–64.) Rosenberg, like Errichetti, has denied ever having seen the Denedy photograph or having discussed it with Weinberg. (*See* Sel. Comm. Hrg., Sept. 9, 1982, at 58–60 (testimony of William Rosenberg); Sel. Comm. Hrg., Sept. 15, 1982, at 78–79 (testimony of Angelo J. Errichetti).) The numerous inconsistencies in Weinberg's various descriptions of the circumstances of the Rosenberg call suggest that it, like the Errichetti call, never occurred.[120]

---

[120] Telephone toll records reflect that Weinberg telephoned Rosenberg and Eden's business twice on January 31, 1979. Because Weinberg did not record either call, it is impossible to deter-

Continued

Weinberg told McCarthy on February 5, 1979, that Eden had been on an extension when Rosenberg had called. (*See Kelly* Def. Trial Ex. 12.) Weinberg has never again mentioned Eden in this context. Further, Weinberg initially told McCarthy that he had convinced Rosenberg and Eden that Kennedy was not an FBI agent by proposing that they verify her identity with a specified organized crime figure. (*See id.*) Weinberg testified at the *Kelly* trial, however, that he had told Rosenberg that Kennedy was in Europe at the time and, therefore, that she could not have been depicted in the newspaper. (*See Kelly* Trial Tr. 1763.) Weinberg testified further that he had telephoned Special Agent Askeland immediately upon having received Rosenberg's call on January 31 and that Askeland had telephoned Good, who had called Weinberg to confirm the appearance of Special Agent Denedy's photograph. (*See id.*) This account is inconsistent with McCarthy's February 5, 1979, FD 302, which states that Weinberg contacted McCarthy, not Good, on February 5, not January 31. (*See Kelly* Def. Trial Ex. 12.) It also contradicts McCarthy's testimony, which confirmed that Weinberg had telephoned McCarthy about Rosenberg's alleged call. (*See Kelly* Trial Tr. 3440–42.) McCarthy also told the Select Committee that he vividly recalled having received Weinberg's call, because he, McCarthy, thought the operation would have to end.

Before the Select Committee, Weinberg again altered his version of the incident. He testified that he had told Rosenberg that he did not know where Kennedy was, but that he nevertheless somehow had convinced Rosenberg that the picture had not been of Kennedy. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 73–74 (testimony of Melvin C. Weinberg).)

Thus, Weinberg deliberately deceived the FBI concerning one, and probably both, of the claimed contacts from middlemen about Special Agent Denedy's photograph. In large part through his deceit, Weinberg received from the FBI a bonus of $5,000 for his purported personal sacrifice to salvage the operation. Moreover, recent interviews with FBI personnel and government attorneys reflect that these individuals have never challenged and continue to believe that, in the Denedy incident, Weinberg rescued Abscam from jeopardy.

IV. SPECIFIC ALLEGATIONS OF INJUSTICE IN THE OPERATION

A. ALLEGATIONS THAT SEVERAL ABSCAM DEFENDANTS WERE INDUCED TO "PLAYACT"

The predominant defense of Representative Michael "Ozzie" Myers, Mayor Angelo Errichetti, and law partners Howard Criden and Louis Johanson, the four defendants in *United States* v. *Myers*, 527 F. Supp. 1206, 1212–13 (E.D.N.Y. 1981), *aff'd*, 692 F.2d 823 (2d Cir. 1982), was that they had been told that Mel Weinberg was bilking his Arab sheik employer and that they could share in the proceeds if Myers would falsely promise to perform official acts to

---

mine the content of these conversations. It appears likely, however, that Weinberg used these telephone calls to establish a cover for his claim that he had discussed the Denedy photograph with Rosenberg.

assist the sheik in acquiring permanent resident status in the United States. Those defendants argued that Myers' inculpatory statements captured on videotape by the government on August 22, 1979, had been made to assist Weinberg in defrauding the sheik and did not evince any intent to perform official acts in return for money.

This defense—that the Congressman was committing fraud, not bribery, and that he had been tricked into acting as though he were taking a bribe—has commonly been referred to by Abscam courts and attorneys as the "playacting defense." The factual allegations on which this defense was based caused former First Assistant United States Attorney for the District of New Jersey, Edward J. Plaza, one of the Abscam prosecutors, to state, at a hearing before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives:

> ABSCAM represents the selective use of technology to create an illusion of criminality. It is and was tantamount to prosecuting the actors in a play for following a script. I emphasize today that I am not speaking of entrapment. I am not speaking about a violation of the separation of powers or any legal technical defense. I am saying that ABSCAM is a perversion of the truth. (House Jud. Subcomm. Hrg., June 2, 1982, at 5 (testimony of Edward J. Plaza).)

Its comprehensive review of the record amassed in the numerous trials and due process proceedings held in federal courts in New York, Philadelphia, and Washington, of the files of the FBI and of other components of the Department of Justice, and of the originals and transcripts of video tapes and audio tapes recorded during the covert stage of Abscam, and its questioning of witnesses in informal interviews and in public and closed hearings, compel the Select Committee to reject the contention that Abscam perverted the truth and convicted individuals for playacting.

1. The Defendants' Factual Allegations

The defendants in *Myers* supported their contention that Weinberg caused Myers to playact by referring to an incident recorded on tape on June 28, 1979, in which Weinberg and Errichetti coached Senator Harrison Williams on what to say in his impending meeting with the sheik. (*See Wms.* Gov't Ex. 14A; pages 229–34 *infra.*) By August 5, 1979, Department of Justice attorneys had criticized Weinberg for the June 28 incident and had instructed him not to coach public officials on what to say. (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 4, 1982); Sel. Comm. interview of John A. Jacobs, July 23, 1982.) The defendants claim that Weinberg did not follow that instruction, but instead merely modified his technique by instructing middlemen, such as Criden and Errichetti, to coach officials on how to playact, rather than directly instructing the officials himself.

The defendants buttressed their playacting argument by pointing to the incident on September 19, 1979, when Ellis Cook, one of Criden and Johanson's law partners, unsuccessfully impersonated an official of the Immigration and Naturalization Service in a meeting with Weinberg and Tony DeVito (Special Agent Amoroso). (*See* pages 434–35 *infra*.) Criden's lawyer argued that the impersonation demonstrated that Weinberg had told the middlemen that they could receive money for playacting and that officials would not be required to perform corrupt acts in return:

> It was quite clear on evidence that can't be refuted that they all believed that Weinberg was setting this thing up just so they could relieve the sheik of some of his petrol dollars. . . . It is quite clear not only that he knew they were playacting but Mr. Weinberg fully expected a playact. That shows what these defendants also expected, and also believed and also had in their minds about the agent provocateur Mr. Weinberg. . . . That shows you what state of mind was. Nobody ever was going to have to do anything. (*Myers* Trial Tr. 3777–78, 3780.)

2. The Judicial Treatment of the Playacting Defense

At trial, over the government's objections, United States District Judge George C. Pratt instructed the jurors that, if they believed the playacting defense, they would have to acquit all defendants, because Myers' subjective intent to perform was an essential element of the criminal charges against all of the defendants.[121] By returning verdicts convicting the four defendants of bribery, the jury in *Myers* clearly rejected the factual allegations of playacting.

In his opinion denying the defendants' post-trial motions, Judge Pratt summarized the importance of the playacting claims to their cases:

> Myers testified on his own behalf and attempted to convince the jury that when he appeared on the videotape and received the money in return for his promise to introduce a private bill to enable the sheik to enter and remain in this country, he was only "play acting." He argued that he had no criminal intent under the federal statutes because he never intended ultimately to do the acts for which he was receiving the money. In other words, Myers' defense was essentially that although he was swindling the sheik, in no way was he compromising his congressional office. Resolution of that central fact question rested peculiarly within the jury's province. They had the opportunity to view Myers on the witness stand and to evaluate his conduct and statements before the TV cameras. In fact, the jury asked to review the key videotapes during their deliberations. Ultimately they resolved this credibility issue against Myers. . . .
>
> Once the jury resolved the central credibility issue as to whether Myers was "play acting" before the cameras with no intent to have it affect his official conduct, the evidence against the defendants was overwhelming, and there is no

---

[121] Judge Pratt agreed with the government's contention that, in theory, each defendant's guilt depended on his own state of mind, not on Myers'; but he nevertheless linked the other defendants' guilt to Myers' state of mind to avoid confusing the jury. (*See Myers* Trial Tr. 3567, 3604, 3610–11.)

basis to set aside any of the verdicts for insufficiency of evidence. (*United States* v. *Myers,* 527 F. Supp. at 1212–13.)

On appeal, the Second Circuit Court of Appeals held that the jury's and trial judge's determinations that defendants had not playacted were supported by substantial evidence:

> The *Myers* jury obviously rejected the defense, and, on the evidence before them, they were certainly entitled to do so. Despite the existence of some evidence that Weinberg, through Errichetti and Criden, had encouraged the Congressmen to "come on strong," as Weinberg acknowledged in his testimony at the *Myers* trial, the jury was entitled to conclude that this was no charade. An entirely plausible inference even from the defendants' evidence, and the one the jury apparently accepted, is that Weinberg was not urging the Congressmen to utter promises they were reluctant to make and did not intend to keep, but was simply anxious to make sure that they fully and unambiguously expressed on videotape the promises they were all too ready to make and fully intended to keep. (*United States* v. *Myers,* 692 F. 2d at 838.)

Nevertheless, the court recited the evidence surrounding the Williams coaching incident and concluded:

> There is a substantial risk that Weinberg, having been admonished for "coaching" Senator Williams, and, even on the Government's version, having heard FBI agents and prosecutors "joke" about his not taping further "coaching" sessions, did decide to encourage Errichetti and Criden to undertake similar "coaching" ventures with the Congressmen. Since we are left with at least a measure of unease as to whether some indirect "coaching" occurred, we prefer to consider the substance of appellants' claims. (*Id.* at 840 (footnote omitted).)

The panel proceeded to analyze the legal sufficiency of the playacting defense and determined that Judge Pratt had incorrectly instructed the jury that playacting was a defense to bribery. The court held that the defendants should have been acquitted only if they had not been predisposed to playact and therefore had been entrapped, or if the coaching had been "so outrageously coercive as to violate due process, wholly apart from the traditional defense of entrapment." (*Id.* at 842.) The court found the entrapment defense procedurally unavailable and the coercion claim factually unsupported.

Thus, under the current law of the case, the facts underlying the defendants' playacting claims are irrelevant to the defendants' guilt and to the safeguarding of their due process rights. Examination of those facts remains critical, however, to the Select Committee's fulfillment of its mandate to evaluate the government's management, direction, supervision, and control of informants and of undercover agents in undercover operations, and the activities and responsibilities of prosecutors in connection with such investigations.

3. The Meaning of "Playacting" and "Coaching"

Upon scrutinizing the several accusations of government misconduct and impropriety made by Abscam defendants, by members of the news media, by former Abscam prosecutors, and by others, the Select Committee has determined that the words "playacting" and "coaching" have been loosely and confusingly used to refer to several distinct factual claims. Apparently as a result of the imprecise usage of those terms by the Abscam defense attorneys, even the courts that have discussed playacting and coaching have used the words in a rather fluid fashion. Accordingly, an evaluation of the defendants' playacting and coaching contentions requires that the meanings of those terms be made clear.

First, the Select Committee reserves the term "playacting" for alleged instances in which, only because Weinberg or middlemen had convinced public officials that they were all engaged in a plot to defraud the sheik, the officials falsely represented at meetings their willingness to exchange the future performance of official acts for the receipt of money. The defendants buttressed this claim by alleging that they had been told that, because the sheik did not understand English, it did not matter at all what Myers said to him when they met.

Second, a differentiable defense is presented by the defendants' contention that they were led to believe that the sheik would offer them money as a pure gift, in conformance with "the Arab way" of dealing with people. (*See Myers* Trial Tr. 3770–71.) Defendants reinforced this second claim by alleging that they had been told that the sheik was so rich that thousands of dollars were like a five-dollar tip to him and that the sheik had already arranged that, if he were forced to emigrate, he would go to South America. In arguing proposed jury instructions to Judge Pratt, Criden's lawyer explained this scenario:

> In this case on these facts he [Myers] was told by the agent provocateur Weinberg that not only wouldn't he be called on to do anything, but that the Sheik himself has made plans to go to South America. That he would never be called on to come to the United States, but the Sheik was interested in somebody who talked tough and would say he would be his friend and do whatever it was he asked. (*Id.* at 3674.)

While this defense shares with playacting the public official's alleged lack of intent to perform an official act, it differs in that it does not rely on a contention that Weinberg convinced the official that they were all attempting to bilk the sheik. Although the two defenses, therefore, are mutually inconsistent factually, the defendants advanced both defenses during the trial, failing to articulate whether they did or did not believe that the sheik thought that he was buying political support for his future emigration to the United States.[122]

---

[122] There is one conceivable scenario that would eliminate the factual inconsistencies between these two defenses. The defendants could have alleged that they understood that they were joining Weinberg in a conspiracy to defraud the sheik *and* that Weinberg had told them that the

Continued

A third defense, which may be termed "coaching," is often mixed with playacting, but is analytically distinct. Weinberg's exhortation of Senator Williams on June 28, 1979, to "come on strong" in the meeting with the sheik, and any instructions by Errichetti to Myers as to what to say in the payoff meeting, constitute coaching. Coaching must be distinguished from playacting in that a coached official is not led to believe that his promises are not meant to be kept; rather, he is induced to make more explicit the promises that he is predisposed to make or to make commitments that he is not predisposed to make.

Fourth, some defendants in Abscam cases other than *Myers* alleged that the government had deliberately created an ambiguous transaction that appeared to constitute an act of bribery, but that actually was an entirely innocent transaction from the viewpoint of the public official. In this version, the official allegedly was not told to say that he would accept a bribe or that he would illegally perform an official act; rather, he allegedly was led into a situation in which the other participants induced him to use words that, especially in conjunction with those other participants' own words and conduct, were susceptible, unbeknown to him, to an interpretation of bribery. Although the public official was "coached" to make various statements, he allegedly never understood the sinister interpretation to which those words were subject. Congressional defendants Frank Thompson and John Murphy both made this claim. (*See* pages 262–85 *infra.*) Similarly, the allegations regarding the March 31, 1979, transaction for which New Jersey Casino Control Commission Vice-Chairman Kenneth MacDonald was indicted fit within this category. (*See* pages 253–57 *infra.*)

The fifth type of defense focuses on the government's linking of illegal conduct to legitimate activities. Such conduct typically consists of enticing an individual with offers of financing for legitimate business ventures, then turning the conversation to illegal proposals, and finally making the legitimate venture conditional on the individual's participation in the illegal transactions. Defendants Criden and Rosenberg both made this allegation. Criden claimed that he had been led to believe that the Arabs' willingness to finance his proposed casino project and to hire him as their lawyer for their legitimate investment ventures depended in part upon his willingness to deliver politicians. Rosenberg claimed that his receipt of a loan from Abdul Enterprises for legitimate business ventures had been conditioned upon his participation in an illegal securities transaction with Weinberg. Finally, there is evidence that, by linking approval of financing for Bob Guccione's casino project with the bribery of public officials, Weinberg unsuccessfully attempted to induce Guccione to bribe casino commission officials. (*See* pages 306–12 *infra.*)

---

chance of getting caught by the sheik was remote, because the sheik was very unlikely to call in his debt. Such a claim would have made their purported willingness to defraud the sheik more reasonable. Defendants never contended at trial that that was their understanding, however; they insisted that they were told not that the sheik was unlikely to try to come to the United States, but that he was certain not to immigrate here. (*See, e.g., Myers* Trial Tr. 2861–62.) This insistence destroys any possible credibility of the pure playacting defense; if the sheik was certain not to come to the United States, representations by public officials of their willingness to help the sheik come to the United States would, whether truthful or fraudulent, be valueless to the sheik and, therefore, inexplicable.

The final related defense focuses on an alleged instance in which, upon being asked to perform some official act in return for money, a public official stated that he would do the requested act, without accepting a bribe, as a matter of public service. In this scenario, Weinberg allegedly replied that "the Arab mind" would not acknowledge public officials' performing public services without receiving money for themselves. Weinberg thereby linked the performance of the official act, which the official viewed as part of his public duty, to the acceptance of a bribe. Thus, the government essentially extorted a public official, by taking advantage of his sense of public duty, to accept a bribe. This scenario differs from the other "Arab way" scenario in that this technique involves an explicit *quid pro quo,* while the other makes the bribe a pure gift. This defense differs from that of linking illicit behavior to legitimate behavior, because it links the bribe to actions motivated by the official's sense of public duty, not to actions motivated by private gain. Philadelphia City Council members Harry Jannotti and George Schwartz both claimed that they were victimized by this strategy. (*But cf. United States* v. *Jannotti,* 673 F.2d 578, 599–603 (3d Cir. 1982).)

The distinctions among these six disparate defenses are relevant to an evaluation of the legal defenses claimed by the defendants and of the allegations of governmental misconduct made by Abscam critics such as former Assistant United States Attorney Plaza and Assistant United States Attorney Weir and by members of the news media. Thus, when used as purported defenses to the crime of bribery, the claims of playacting and of the "Arab way" gift scenario constitute, at most, a denial of the existence of the requisite corrupt intent under the bribery statute. The claim of a deliberately ambiguous transaction may underlie a contention that the public official never received money, never made a promise, or never had the requisite criminal intent. The other defense claims—coaching, linkage with legitimate business, and the "Arab mind" scenario—can be offered to support only an entrapment defense. All six defense allegations can also be used to raise a challenge on broad due process grounds.

The six different claims also present differing issues of fact and of policy. All of the claims, however, raise questions concerning appropriate techniques for the government to use in an undercover operation; all highlight important issues concerning the degree of discretion vested in informants and undercover agents; and all suggest troublesome issues of conformance with the government's purported requirement that undercover operations "mirror reality." (*See, e.g.,* Attorney General's Guidelines on FBI Undercover Operations ¶ J(3) (Jan. 5, 1981).)

4. An Evaluation of the Defendants' Factual Allegations Regarding Playacting, Coaching, and Related Conduct

Initial skepticism about the *Myers* defendants' alleged playacting [123] results from observing that, although the playacting scenario was, according to those defendants, Weinberg's constant *modus operandi,* none of the criminal defendants in the many other Abscam cases made similar allegations. Lederer, who received money less than three weeks after Myers, claimed only that he had been entrapped. (*See Lederer* Trial Tr. 1056–59 (Lederer's summation to jury); *id.* at 1134, 1174–76 (Judge Pratt, summarizing Lederer's contentions to jury).) Thompson and Murphy claimed that they had not even known that money was being offered, had not agreed to receive money in return for a promise to perform an official act, had not received money, and had attended meetings solely to encourage the sheik to invest money in their congressional districts. (*See Thompson* Trial Tr. 3088–90 (Judge Pratt, summarizing defendants' contentions to jury).) Senator Williams and Alexander Feinberg claimed that they had been involved solely in a legitimate business transaction and that they had been entrapped. (*See Wms.* Trial Tr. 5527 (Judge Pratt, summarizing defendants' contentions to jury).) Richard Kelly argued that he had been conducting his own investigation and that he had been entrapped. (*See Kelly* Trial Tr. 4672–80.) Kelly's codefendants, Gino Ciuzio and Stanley Weisz, contended that they had not known that Kelly was to receive money for agreeing to help the Arabs. (*See id.* at 4723–42, 4791–92.) John Jenrette and his codefendant, John Stowe, argued that they had been entrapped. (*See Jenrette* Trial Tr. 4485–88, 4747–48.) Harry Jannotti and George Schwartz contended that they had been entrapped and that the government operatives had linked investment in Philadelphia to the defendants' acceptance of money. (*See Jannotti* Trial Tr. 6.80–.83, 6.108–.109, 6.144–.145, 6.159–.167, 6.219–.223.) Alexander Alexandro, Jr., argued that he had been conducting his own investigation. (*See Alexandro* Trial Tr. 1161–66.) His codefendant, Alfred Carpentier, contended that he had been involved in a legitimate business venture, that he had been coached by Weinberg, and that he had been unaware of Alexandro's criminal actions. (*See id.* at 110–20.) Although the failure of the other defendants to make playacting allegations similar to those of the *Myers* defendants does not prove that the *Myers* claims are false, the absence of similar claims does decrease the likelihood that Weinberg or middlemen induced the *Myers* defendants to playact.

---

[123] The material in text shows the absence of a credible factual basis for the alleged playacting defense. It cannot be overemphasized that, even if such a defense had been proved, the very assertion of the defense requires an admission that the playacting defendants were attempting to commit a fraud.

(a) Events leading to the August 22, 1979 meetings

The events from July 26, 1979, when, the government contends, the asylum scenario was created on the FBI yacht ostensibly owned by the sheik (*see* pages 77–83 *supra*), through August 22, 1979, when Myers received $50,000 from DeVito (Special Agent Amoroso), further support the absence of playacting. The *Myers* defendants contend that the asylum scenario was raised on the yacht in such a way as to promote the relaying of a message of available money with no strings attached:

> Errichetti was used to relay the message concerning the introductions and to promote the 'windfall' aspects of the offers. Such conversations involving Errichetti and others would not be recorded. Thus, the stage would be set for the unwitting individuals to come forward and perform the script without any recordation of these promotional activi-

> ties instigated by Weinberg. (*Myers* Defendants' submission 33 n.*.)
>
> * * * * * * *
>
> The plan utilized by Weinberg was dependent upon a chain reaction. Errichetti hyped the seemingly harmless plan to Criden, who in turn convinced his law partners, Johanson and Cook, of its legitimacy. Johanson then agreed to lure a politician. * * * (*Id.* at 35 n.*.)

Defendants' claim is not supported by the evidence, which clearly shows that from the beginning the defendants were told that the sheiks would pay money *in return for future help with immigration problems.*

A contemporaneous FBI document reflects that the conversation in which the asylum scenario was raised was attended by DeVito, Weinberg, Errichetti, and Criden. The document indicates that only DeVito and Errichetti spoke, with DeVito raising the immigration problem and Errichetti responding that politicians could be obtained to assist if money were available.

The defendants' various versions of this conversation are mutually inconsistent and incredible. Criden first testified before the Select Committee that several conversations had occurred on the yacht on July 26 in which the only participants had been Criden, Errichetti, and Weinberg. He then testified as follows:

> Q: Was there any discussion in your hearing on the boat that day of any sheiks in any country in the Middle East who might need to leave the Middle East and try to seek asylum in the United States at any future time?
>
> A: Not to my recollection.
>
> Q: Was there any discussion of politicians in your presence on the boat?
>
> A: No, sir. (Sel. Comm. Hrg., Sept. 14, 1982, at 7 (testimony of Howard L. Criden).)

Errichetti responded to a similar question by the Select Committee as follows:

> Q: Do you recall being onboard *The Left Hand* when the yacht turned up the Intercoastal Waterway, and your having a conversation with Weinberg, Criden, and Amoroso about Somoza?
>
> A: * * * I took a nap on [the top deck] of the boat. The only time I heard "Somoza" from either Tony or the guy that was steering the boat, was, "That's where Somoza lives", pointing, and we looked, like that, and I laid down. There was no other conversation that I remember me offering, or suggesting, and/or being told that there was an immigration problem * * *. (Sel. Comm. Hrg., Sept. 15, 1982, at 172–73 (testimony of Angelo J. Errichetti).)

Thus, unless the FBI document that was prepared shortly after July 26 and that states that Amoroso articulated the asylum scenario on the yacht on that date is false, the defendants' testimony would, to be believed, require the Select Committee to conclude that Amoroso was speaking to himself when he articulated the asylum scenario on July 26. Further, it would have been more than odd for Errichetti to have "laid down" to take a nap on the top deck of the boat, since the top deck had neither bunks nor deck chairs, since the trip lasted for only about an hour, and since Criden testified that Errichetti participated in several conversations with him in that time. Even further, while Errichetti expressly recalled, in response to a question about a conversation involving himself and Criden, having heard Somoza mentioned on the yacht, and while the defendants filed a joint brief in the court of appeals admitting that Criden had been present when Somoza had been mentioned, Criden denied any recollection of having heard Somoza mentioned on the yacht. (*Compare* Sel. Comm. Hrg., Sept. 14, 1982, at 6 (testimony of Howard L. Criden) *with* Sel. Comm. Hrg., Sept. 15, 1982, at 173 (testimony of Angelo J. Errichetti).)

Moreover, the defendants agree that on the airplane trip on which Criden and Errichetti returned from Florida on July 26, 1979, the two men discussed the Arabs' interest in meeting politicians.[124] Criden testified, however, that he had not heard that the Arabs' interest in meeting politicians involved possible immigration status until he was told so by Myers after August 22, 1979: "I probably heard it first, I would say, from Congressman Myers, I believe, who related to me what he had been questioned about when he went to the meeting with Mr. Weinberg and Mr. Amoroso, accompanied by Mayor Errichetti." (Sel. Comm. Hrg., Sept. 14, 1982, at 9 (testimony of Howard L. Criden).) But Errichetti testified that on some date before July 26, 1979, he had been told to tell congressmen that the sheiks might need help in getting asylum in the United States. (Sel. Comm. Hrg., Sept. 15, 1982, at 180–81 (testimony of Angelo J. Errichetti).) Criden would therefore have the Select Committee believe the unlikely version that Errichetti told him, whom Errichetti had known for only a few days, that money was available for congressmen, yet withheld the crucial information about the basis for any payment; that Criden, who, similarly, had known Errichetti for only a few days, believed the inherently silly story of Arabs wanting to pay tens of thousands of dollars just to be introduced to Congressmen; that Criden did not ask Errichetti why the Arabs would want to do that; and that, on the basis of that half-hour conversation, Criden began trying to contact Congressmen.

Criden's testimony is further undercut by the transcript of the August 22, 1979, meeting, in which Myers himself raises the issue of "immigration matters" (*see Myers* Gov't Trial Ex. 5A, at 2), thereby showing that he had previously learned from at least one of his middlemen—Criden, Johanson, and Errichetti—that immigration matters were of interest to the sheik. Similarly, Ellis Cook, Criden's law partner, testified that he had first learned of the connection between paying politicians and the Arabs' immigration problems from Criden sometime before the Myers meeting, although he could not remember when. (*See Myers* Trial Tr. 1133–37.)

---

[124] Errichetti testified, quite implausibly, that the conversation did not result from any conversation on the yacht that afternoon, but, in a remarkable coincidence, sprang up on that day from a discussion Errichetti had had with Weinberg more than four months earlier. (Sel. Comm. Hrg., Sept. 15, 1982, at 173–75 (testimony of Angelo J. Errichetti).)

Similarly, on February 2, 1980, Louis Johanson, Criden's law partner, told the FBI that on July 26, 1979, upon returning from Florida, Criden had told him that there were Arabs who were worried about the Middle East situation and who were looking for influential people to help them if immigration problems were to arise. Myers testified that Johanson had told him of the immigration problem at the outset. Myers described his first meeting with Johanson, at which Johanson had asked him if he would be willing to meet the Sheik, as follows:

> I said, "Do I have to know anything?" "Well, the Sheik may ask you some questions about immigration. There was some talk about," he [Johanson] said, "Maybe a hostile situation where he currently lives. He might have to try to come to America. He may talk to you about that. But," he said, "I am not sure about that." (*Id.* at 2712.)

Criden was the only possible source for Johanson's knowledge, expressed to Myers at that first meeting within a few days of July 26, 1979, of the asylum scenario.

Thus, there is simply no room to doubt that Criden, Errichetti, Johanson, and Myers all knew of the asylum scenario within days of DeVito's recital on the yacht. The Select Committee rejects Criden's and Errichetti's testimony to the contrary.

The defendants claim, however, that Weinberg informed Errichetti and Criden that the asylum scenario was really a ruse and that they would be paid for producing congressmen who would make promises, even with no intention of fulfilling the promises. Criden testified before the Select Committee, "I was under the impression throughout the entire situation that they would never be asked to do anything, and Mayor Errichetti had assured me that this was all just a play, a way for Mr. Weinberg and Mr. DeVito to spend a lot of the sheiks' money, and that nobody would ever be called upon to do anything." (Sel. Comm. Hrg., Sept. 14, 1982, at 11 (testimony of Howard L. Criden).) The defendants support this claim by citing Cook's testimony at trial that "Mr. Criden always used the term no quid pro quo in describing the meeting with the Sheik's representatives." (*Myers* Trial Tr. 1268.)

It is unclear whether Criden meant that no *specific quid pro quo* was required or that no immediate action by the public official would be needed or that he was not bribing public officials. In any event, the balance of Cook's testimony on direct examination at trial demonstrates that Cook understood that their mission was to pay off politicians to put themselves in a position to obtain favors from those politicians in the future—not just to pretend to put themselves in that position. In particular, Cook responded to Puccio's questions as follows:

> Q: Were you ever told at this time that the Sheik and his representatives were willing to pay money to alleviate certain concerns that you have?
>
> A: He had indicated, we were told that the Sheik would pay to meet with the Congressmen and explain his position that he wanted to come into this country if there was a revolution in his country.

Q: And in this connection you were told that the Sheik or his representatives wanted to pay the Congressman money to do something; is that right?

A: It was never said to do something, sir. What was indicated is that he wanted to have the meeting, pay the Congressman so in the event anything happened he would have a friendly face here in this country if he had to come here quickly.

Q: What would this friendly face do? What were you told?

A: I was told by Mr. Criden that the Sheik wanted to meet with Congressmen so that he can explain his position, that he was willing to invest in this country. But *he wanted to be able to come into this country with his family in the event there was a revolution or he had to leave his country.* And he wanted to meet with various Congressmen so there would be a friendly face, if this event ever occurred. That's what I was told.

Q: Were you told by Mr. Criden how the Congressman's face would become friendly?

A: It's just that there was somebody he could approach that he had already met, somebody that wasn't a stranger in the event of a revolution when he wanted to come to *somebody that sort of owed him a favor, was my understanding. It was somebody who had done something for him,* explaining—

* * * * * * *

Q: And were you told by Mr. Criden or Mr. Johanson what the Congressman was to do for this money?

A: All it was is that *he would help the Sheik come* into this country. And the expression was if he was going to invest in this country and do this sort of thing, could the Congressman help him if it was necessary to come into this country.

* * * * * * *

Q: *Was it your understanding, based upon your conversation with Mr. Criden that the Sheik would pay a congressman so the congressman would be beholden to him?*

A: *Is that my understanding?*

Q: *Yes.*

A: *Yes, sir.* (*Id.* at 1137–42 (emphasis added) (intervening objections omitted).)

Finally, Puccio asked Cook specifically about the playacting scheme:

Q: Now, Mr. Cook, were you ever told anything by anyone about a script that Congressman Myers would have to read for the Sheik's representatives?

A: No, sir.

Q: Were you ever told by anyone that at the August 22nd meeting, Congressman Myers would put on an act for the Sheik's representatives?

A: What I was told is, he had to meet with Mayor Errichetti beforehand, where they would prepare him for what he would say; and then he would meet.

Q: Were you ever told that he would put on an act and say things that he really didn't mean? Were you ever told that?

A: No, sir. (*Id.* at 1162–63.)

Examination of the tape transcripts of conversations shortly after July 26, 1979, lends support to Cook's understanding that Criden and Errichetti believed that they were engaged in a real search for political figures who would assist the sheik in his immigration problems. In a telephone conversation on July 29, 1979, Errichetti first told Weinberg that Myers had agreed to participate. Errichetti then told Weinberg that other Congressmen were being lined up, and he continued:

ERRICHETTI: Now, ah, I've also have the potential for the Department of Naturalization * * * one of the officials.

WEINBERG: All right.

ERICHETTI: For the green card.

WEINBERG: Right.

ERRICHETTI: And he said, an * * * I said to him what about * * * ah * * * guaranteeing this * * * My friend the sheik (inaudible) * * * needs one.

WEINBERG: Right.

ERRICHETTI: Okay, how many can you handle?

WEINBERG: As many as you can give me.

ERRICHETTI: Okay.

WEINBERG: All right.

ERRICHETTI: Right.

WEINBERG: As many as you can give me, I can handle.

ERRICHETTI: Okay.

WEINBERG: Because that's the number one priority with him.

ERRICHETTI: Well.

WEINBERG: Especially after they came out with that Somoza thing. (*Myers* Gov't Trial Ex. 19A, at 1–3.)

The next day, July 30, 1979, Errichetti and Weinberg talked on the telephone again and discussed scheduling a meeting with Myers. Criden was in the room with Errichetti. (*See Myers* Gov't Trial Ex. 20A.) Errichetti and Weinberg discussed the arrangements for Myers and subsequent congressmen by telephone twice on July 31, once on August 1, and once again on August 2, 1979. In none of these conversations, which included only the supposedly playacting conspirators, is there any indication that the Congressmen were being asked to come to a meeting to make false promises to the sheik's representatives. On the contrary, the transcripts suggest that Errichetti understood that Weinberg was seeking individuals who would provide real guarantees for the shiek. When asked by the Select Committee to explain why he and his fellow playactors would have "playacted" in those conversations, when they were the only participants and there was nobody to deceive, Errichetti lamely responded, "I do not know. I am just caught up in this thing with those people, and it was just a commonplace that we discussed it. Now, whether they were—I cannot explain it."

(Sel. Comm. Hrg., Sept. 15, 1982, at 170 (testimony of Angelo J. Errichetti).)

Criden had equally severe credibility problems on this issue. In testifying before the Select Committee, he admitted that Errichetti had told him about a conversation of August 8, 1979, between Errichetti and DeVito (Special Agent Amoroso) in which DeVito "had told him flatly that the Congressman would have to introduce some kind of legislation." (Sel. Comm. Hrg., Sept. 14, 1982, at 23 (testimony of Howard L. Criden).) Criden also testified that it was sometime after August 22, 1979, that he first had been told to ignore DeVito's statements. (*Id.* at 24.) Therefore, at the time of the Myers preparation and payoff, Criden believed that Myers would be required to promise, and eventually to perform, a corrupt act.

The defendants also have problems explaining how DeVito fit into their playacting scenario and accounting for their behavior in his presence. Sometimes, the defendants argue that they believed that DeVito remained loyal to the sheik and was not in on Weinberg's playacting fraud against the sheik. On other occasions, they suggest that they believed that DeVito and Weinberg were both disloyal, but that DeVito was slightly more honest than Weinberg and wanted to be able to report honestly to the sheik that a meeting had taken place with a Congressman who had promised to undertake corrupt acts. Criden's lawyer seemed to argue both positions almost simultaneously:

> But, another part of the scenario was this situation would not last forever and Mel Weinberg was going to sting the sheik, take a little money on the side, *make a dollar along with DeVito,* and these people went along, they can share in it too. *Mr. DeVito is straight, he was the watchdog,* so be a little careful around here." (*Myers* Trial Tr. 3770 (emphasis added).)

Johanson's lawyer did not even attempt to explain Amoroso's role: "I don't know about Amoroso. I'm not sure I can argue to you about Amoroso. I don't know that you know enough about Amoroso and his involvement. It's an enigma to me." (*Id.* at 3831.)

Moreover, the contention that Weinberg told Errichetti and Criden that DeVito was in on the fraud cannot be reconciled with the transcripts of meetings attended by DeVito. On August 5, 1979, for example, Errichetti met with Weinberg and DeVito and discussed Myers' participation:

> DEVITO: He's gonna have to * * * he's gonna have to like move that through somebody in the State Department.
>
> ERRICHETTI: Sorry?
>
> DEVITO: He's gonna have to move that like through somebody in the State Department.
>
> ERRICHETTI: Who?
>
> DEVITO: The Congressman.
>
> ERRICHETTI: *He'd do anthing* * * * he's gonna be your fucking man * * * . *Anything you want.*
>
> DEVITO: Yeah.

> **Weinberg**: All he's got is to tell Yassir is that uh when the time comes . . . I will sponsor anything you want.
>
> **Errichetti**: Yeah.
>
> **Weinberg**: Huh.
>
> **Errichetti**: He'll say that.
>
> **Weinberg**: You know.
>
> **Errichetti**: He'll say that * * * let me tell you something.
>
> **DeVito**: I know it.
>
> **Errichetti**: Let me tell you something. This guy is good, Myers is good * * * we got a stronger guy in the State Department.
>
> **Weinberg**: Who's that in the State Department?
>
> **Errichetti**: I got the guy (inaudible) * * * (inaudible).
>
> **Weinberg**: He gives you what?
>
> **Errichetti**: He gives you the green cards out.
>
> **Weinberg**: He gives them out?
>
> **Errichetti**: Yeah.
>
> **DeVito**: *I may have * * * I may have to go to him * * * for that card.*
>
> **Errichetti**: *For who?*
>
> **DeVito**: *For your guy?*
>
> **Errichetti**: Yeah.
>
> **DeVito**: *For that card* * * * because * * * ah * * * I don't know.
>
> **Errichetti**: I was thinking about Yassir himself * * * getting the guarantee from the guy from the State Department * * * *you need the cards you get it anytime you want.*
>
> **DeVito**: Okay.
>
> **Errichetti**: That's the key.
>
> **Weinberg**: The main thing is Yassir * * * he gets that he's got these guys on the side * * * if we need there's problems now boy * * *. ([Deleted] [125] (emphasis added))

On August 6 with DeVito and Weinberg, on August 7 with DeVito, Weinberg, and Criden, on August 8 with DeVito and Weinberg, and on August 13, August 15, and August 16 with Weinberg, Errichetti had further conversations in preparation for the Myers meeting. None of these conversations contained any hint of preparations for a fraud against the sheik. The August 8 meeting included the following exchanges:

> **Errichetti**: He [Myers] is ready, willing and able tomorrow morning. He called me this morning.
>
> **DeVito**: *He'd have to introduce some kind of legislation, right, some kind of bill or something.*
>
> **Errichetti**: *Whatever you say.*
>
> **DeVito**: Well, I don't know, whatever I say, he's the guy that knows more about what has to be done that I would, I don't you know, I.
>
> **Errichetti**: You mean in regards to Yassir.
>
> **DeVito**: Yeah.

---

[125] The omission of a citation to a confidential document is identified by "[Deleted]". *See* pp. V–VI *supra*.

> **Weinberg**: Yeah, let him tell Yassir whatever he had to tell him.
>
> **DeVito**: I mean what I'm saying is, yeah, what I'm saying is, he would know better what procedure * * *.
>
> **Weinberg**: Well if it comes to pushing it up, big people behind him going to the right people, saying, hey, let this guy in, they can give him political whatever the hell they call it.
>
> **Errichetti**: I'll naturally talk to Ozzie first, I'm just trying to grasp as to he'll say, Ozzie's got balls that for openers." (*Myers* Gov't Trial Ex. 4A, at 1-2 (emphasis added).)

Similarly, on September 14, Errichetti engaged in the following dialogue with Weinberg in DeVito's presence:

> **Weinberg**: Just down the line, we may want another favor.
>
> **Errichetti**: I will not quarrel with that, either.
>
> **Weinberg**: You know what I mean. So it pays.
>
> **Errichetti**: (inaudible) * * * pick the phone up.
>
> **Weinberg**: So long as we got the green light, what the hell's the (inaudible).
>
> **Errichetti**: I'm telling you—all I'm telling you is that you know very simply, you are correct in that assumption, can't say no. Know why? Because I'm there. [Laughs].
>
> **Weinberg**: Somewhere along the line, want a favor. ([Deleted])

At the Select Committee's hearings, Errichetti was asked why he would have gone through conversations such as these with Weinberg and DeVito if all three of them were setting up a playact:

> Q: If you and Mr. DeVito and Mr. Weinberg are in a conspiracy to rip off the Shiek and his crowd, why do you go through that dialogue when you three are the only three present, for goodness' sake? Why don't you say—since you do not know it is being recorded—why don't you just say, "Hey, how is our conspiracy going?" for goodness' sake?
>
> A: A good question, because I asked the same——
>
> Q: What is the answer?
>
> A: I asked the same question. * * *.
>
> Q: Well, why are you telling them that, when they are your co-conspirators?
>
> A: Well, I don't know that it is being taped. They are playing for the tapes, and I am not.
>
> Q: But that is the whole point; you did not know that.
>
> A: I did not know anything, except we were discussing, everything is all set. I am talking to them as fellow conspirators, that everything is set.
>
> Q: But you are acting as if this is real.
>
> A: Sir?
>
> Q: No, no.
>
> A: It is not real. (Sel. Comm. Hrg., Sept. 15, 1982, at 167-69 (testimony of Angelo J. Errichetti).)

Errichetti was specifically asked by the Select Committee whether he had been told to disregard DeVito's or Weinberg's statements:

> Q: Did Weinberg ever tell you not to believe things that Amoroso said?
> A: Amoroso?
> Q: Right, DeVito.
> A: No. * * *.
> Q: Did Weinberg ever tell you that Amoroso might be listening in on your conversations, on telephone conversations?
> A: No * * *.
> Q: Other than the one instance you have [testified occurred on March 31, 1979], did Weinberg ever tell you, prefatory to any other conversation, that anyone might be listening in on a conversation, and you should structure your talk in a certain way?
> A: No * * *. (*Id.* at 225.)

Thus, when he had those several conversations with DeVito and Weinberg in which they expressly told him that Myers would have to promise and produce, and in which he told them that Myers could and would do both, Errichetti had absolutely no reason to be playacting.

Only two exchanges in the entire period of preparations for the Myers meeting can even arguably be reconciled with the playacting defense, and even these are ambiguous. First is the August 7 meeting among Criden, Erichetti, Weinberg, and DeVito:

> WEINBERG: This, when he meets Yassir just tell him to come on strong.
> CRIDEN: Well he's gonna give him a briefing.
> ERRICHETTI: I'll give him * * *.
> WEINBERG: The stronger the better. (*Myers* Gov't Trial Ex. 3A, at 3.)

Second, Erichetti and Weinberg spoke by telephone on August 15:

> WEINBERG: Then, ah, what time, time you wanna make it for for Wednesday with the, er, Congressman?
> ERRICHETTI: Well, I, I talked to him briefly.
> WEINBERG: Yeah.
> ERRICHETTI: I told him about, you know, a wet closing and a dry closing Wednesday and Friday.
> WEINBERG: Right.
> ERRICHETTI: He says, "I'm jammed up," he says, "why can't we make it one day where I go up a little early and your good friend can give me the script and I can do that you know." He said, "you know, I prefer to go one day, Wednesday or Friday, whatever you want and I come up early so that we can meet, you know, privately like we're supposed to and go over the whole thing so that I can understand what has to be done and I'll do it."
> WEINBERG: Eh, heh.
> ERRICHETTI: Is that possible?

Weinberg: Ah, let me see if I can arrange it.

Errichetti: All right.

Weinberg: All right.

Errichetti: Okay.

Weinberg: Make it Wednesday, then.

Errichetti: Whatever, you know.

Weinberg: Okay.

Errichetti: Whatever you want to do. He has no problem coming up like 9:00 in the morning and then sitting down with you, and I, you know, and going over the whole thing, and then like 1:00 go through with it, you know, whatever.

Weinberg: All right.

* * * * * * *

Errichetti: Okay, then we'll do it Wednesday and I'll give him like 10:00 in the morning.

Weinberg: All right.

Errichetti: With him. Then we can meet at 1:00 with whoever we have to meet with, but it still be with you and I by ourselves at a different place like . . .

Weinberg: Okay. * * *. All right, I'll go over everything with you Monday. (*Myers* Def. Trial Ex. T-5, at 3-5.)

These two passages can be construed to lend some support to the defendants' claim that the Williams' coaching incident on June 28 was not an anomaly and that Weinberg continued, contrary to the instructions given him on or before August 9, to prepare, or to cause middlemen to prepare, public officials, out of Amoroso's presence and in unrecorded sessions, for their meetings with Amoroso. If that construction is correct, it shows that the government's supervision and control of Weinberg was insufficient to prevent improper coaching and that the video tapes of public officials receiving money do not fully reveal the relevant circumstances surrounding the transactions for which officials were convicted. Even if so construed, however, these two transcripts do not furnish any reasonable basis for the defendants' claims that they were playacting. The defendants cannot refute the simple observation that, if they and Weinberg were planning to defraud the sheik, they would have openly discussed that plan among themselves and would not have used ambiguous phrases such as "dry closing."

(b) The August 22, 1979, Meetings

It does appear that there was a "dry closing" of sorts before the August 22 meeting with Myers at the Travelodge International Hotel adjacent to John F. Kennedy International Airport in New York. By prearrangement, Myers, Errichetti, Criden, and Johanson met at the airport beforehand. (*See Myers* Trial Tr. 1391-93.) Errichetti proceeded to the hotel, where Weinberg met him in the lobby. (*See id.* at 1650.) After Weinberg had returned to the hotel room, Myers and Errichetti rendezvoused in the lobby and proceeded together to the hotel room, where they met with DeVito and Weinberg on video tape. (*See Myers* Gov't Trial Ex. 5.) Weinberg testified that, pursuant to instructions, he met Errichetti in the lobby to tell him that the amount of the bribe had been reduced from $100,000 to $50,000. (*See Myers* Trial Tr. 1650; Sel. Comm. Hrg., Sept. 16, 1982, at 129–30 (testimony of Melvin C. Weinberg).) Errichetti corroborated that Weinberg had delivered such a message. (Sel. Comm. Hrg., Sept. 15, 1982, at 197 (testimony of Angelo J. Errichetti).)

Myers testified that, when he had first met Criden, Errichetti, and Johanson at the airport, Errichetti had pulled him aside and had told him that there was a change in plans and that Weinberg would not be able to brief him, but that Myers should just "come on strong" with the sheik and should not worry, because the sheik did not understand English. (*See Myers* Trial Tr. 2716–17, 2816–17, 2850–55.) If Myers is to be believed, therefore, at that point he believed that his task was to meet with the sheik and to defraud him into thinking that Myers would, if necessary, assist the sheik in obtaining residency in this country.[126]

Myers also testified, however, that, when he later met Errichetti in the hotel lobby, Errichetti told him that the sheik would not attend the meeting after all, but that Myers should nevertheless "come on strong" with the sheik's representative who would be present. Myers testified that, when he expressed concern that the representative, who presumably spoke English, would detect his ignorance of immigration matters, Errichetti merely told him that Weinberg had said that the sheik was going to South America and that the immigration matter was therefore irrelevant. (*See id.* at 2718–19, 2817–18, 2858–62.) But this alleged explanation by Errichetti obviously rendered the meeting with the sheik's representative an inexplicable absurdity from Myers' viewpoint: the sheik was not going to be there to be fooled by Myers' false promises of help with immigration, and, on top of that, the sheik was not interested in immigration at all. Myers' *raison d'etre* had evaporated; his false promises would be valueless.

The defendants attempt to explain this bizarre contention by feebly asserting, "The change of events was of such a rapid nature that Myers obviously could not reason his way through the facade to comprehend that he was being prepared for a fatal performance." (*Myers* Defendants' Submission 39 n.*.) The defendants thus would have it believed that this "rapid change of events" rendered Congressman Myers unable to ask Errichetti what the point of his playacting was if the sheik, first, was not going to attend the performance, and, second, did not want to come to the United States anyway. The Select Committee rejects this contention.[127]

---

[126] One immediately wonders, of course, why Myers would have been told, under the defendants' version, not to worry, because the sheik did not understand English. If an interpreter was to be present, the sheik's lack of fluency in English would be irrelevant, since he still would be told what representations Myers was making. If no interpreter was to be present, the sheik could not be expected to come to believe that Myers would and could help him if necessary, because the sheik would not know what Myers was saying he could and would do.

[127] To disbelieve Myers' testimony, however, is not to approve of the FBI's failure to prevent Weinberg from meeting Errichetti privately a few minutes before Errichetti took Myers to a meeting. It is difficult to imagine any justification, less than a month after the improper coaching of Senator Williams and less than two weeks after the August 9 instructions to Weinberg not to coach, for such a failure. There is, to be sure, a clear conflict between Weinberg's testimony and the testimony of the FBI agents responsible for him that day. Weinberg testified that he was *instructed* (not just allowed) to meet Errichetti before the Myers meeting. On the other hand, FBI Supervisor Good testified that he believed that Weinberg had not met Errichetti shortly before the meeting with Myers (*see Myers* D.P. Tr. 2673–74), and Special Agent Amoroso

Continued

The crowning incongruity in the defendants' playacting contention is the August 22, 1979, meeting itself, at which Myers, in the presence of Errichetti, DeVito, and Weinberg, accepted an envelope containing $50,000 in cash. Myers spent 35 minutes telling DeVito how he could help solve the sheik's immigration problems and encouraging DeVito to have the sheik invest in the Port of Philadelphia. In Myers' first speech at the meeting, he volunteered the influence of his fellow Pennsylvania congressmen: "So we have influence. Ah, also, we have representation on the Judiciary Committee from our State, uh, which is very keen with immigration matters." (*Myers* Gov't Trial Ex. 5A, at 2.) DeVito immediately asked Myers how he could assist the sheik in obtaining asylum, and Myers responded with a detailed offer of assistance, including introducing private legislation, intervening with the chairman of the Judiciary Committee, and lining up additional congressional support. (*See id.* at 2-4.) Myers made numerous explicit guarantees of assistance on the legislative front and with the Department of State. (*See id.* at 4, 5, 6, 9, 10, 11-12, 13, 14, 29.)

Because, as noted above, Myers has testified that immediately before that meeting with DeVito, Weinberg, and Errichetti, Errichetti had told him that immigration was "out of the picture" (*Myers* Trial Tr. 2862), the entire sustained discussion of immigration at the meeting appears to be inexplicable. Myers' attempt to make sense of the incongruity is incoherent. On cross-examination by Puccio, Myers testified as follows about the immigration discussion at the meeting:

> Q: Right after that you say, well since the sheik is going to South America, you have no immigration problems, is that what you say?
>
> A: No.
>
> Q: Why don't you say that?
>
> A: Because at this point in time the only one I know in the room knows about the operation is myself, Mayor Errichetti, and Mel Weinberg. I don't know anything about Mr. DeVito other than he is a representative of the sheik. * * *
>
> Q: If the sheik was going to South America, why did you feel it was necessary to bring up these different possible solutions?

---

told the Select Committee that the decision not to have the sheik attend the meeting had been made well in advance, that he believed Myers knew of the substitution well in advance, that he could not remember whether he or Weinberg had told Errichetti on the day of the meeting of the reduction to $50,000, but that he knew nothing about Weinberg's visiting Errichetti in the lobby before the meeting.

In addition, Myers testified that Errichetti did not pass any information on to him about the reduced funds to be paid, (*see Myers* Trial Tr. 2858-59), and the conversation among Errichetti, Weinberg, and DeVito immediately after Myers left with the $50,000 confirms that Errichetti did not tell Myers before the meeting that the payoff had been reduced to $50,000. (*See Myers* Gov't Trial Ex. 6A, at 14.) This same conversation includes a provocative, but inscrutable, hint of Weinberg's intent in meeting Errichetti before the Myers payoff. Errichetti asked Weinberg, in DeVito's presence, what Weinberg had meant when he had told Errichetti that he had both "good news" and "bad news" for him. Weinberg responded that the reduction in the size of the bribe had been the bad news, but that he had not yet conveyed the good news. Weinberg proposed that he and Errichetti get something to eat, and he escorted Errichetti out of DeVito's presence and off-camera, apparently to convey the mysterious "good news." (*See id.* at 16-17.)

> A: I thought Mr. DeVito was going to go back to the sheik and report to him exactly what took place in his conversation.
>
> Q: This would impress the sheik because the sheik was going to South America?
>
> A: No, I thought it was going to impress the shiek that I was an important person." (*Myers* Trial Tr. 2863-64, 2880-81.)

Similarly, Myers' contention that he was told and that he believed that the sheik was planning to go to South America and not to the United States is belied by the recording of his conversation with DeVito (Special Agent Amoroso):

> DEVITO: Well, I don't, I'm not, you know, we talked a little bit about it. But, I don't know of what the case is, that—
>
> ERRICHETTI: Well, there is no case at this moment.
>
> DEVITO: Uh, well, yeah, what we're saying is we're insuring that when, when * * *.
>
> MYERS: When the time comes, if it comes * * *.
>
> DEVITO: When the time comes, yeah, when, when this thing occurs, OK? Gonna come to you and say, hey, here's here's the guy. He'll he'll be here. OK?
>
> MYERS: Yeah.
>
> DEVITO: And, then, from what you, is, you're gonna introduce a bill, OK? To get him, once he's here, right?
>
> MYERS: Yeah. * * *.
>
> DEVITO: * * * what, what I'm getting at is let's take, let's take it as the worst possible situation * * *.
>
> MYERS: OK.
>
> DEVITO: * * * that we can have it. Alright?
>
> MYERS: Yeah.
>
> DEVITO: You know, I want, I want, I want it covered from the worst situation figuring that anything else, any other situation * * *.
>
> MYERS: Is (inaudiable).
>
> DEVITO: * * * is, is better, is, ah, is in our favor. OK? Whatever you could conceive * * *.
>
> MYERS: (Inaudiable) the worst.
>
> DEVITO: * * * of as being the worst possible situation that this guy coming in, ah that's what I want to know, how you would, how you'd work that * * *.
>
> ERRICHETTI: He has to put a bill in.
>
> MYERS: I'd have to put a bill in at that point. (*Myers* Gov't Trial Ex. 5A, at 7, 8-9; *see id.* at 15.)

These remarks demonstrate that Myers understood that he was being paid to perform in the event the sheik needed his assistance in the United States.

Other conduct by Myers at the meeting reinforces the conclusion that he fully understood that DeVito was offering, and that he was accepting, a bribe. At one point, Myers stated that he had "all sorts of people coming from the middle east and the OPEC countries that want to make deals and want to buy a little security here.

But, who the hell knows who you're dealing with?" (*Id.* at 12.) Myers emphasized that "the key is you got to deal with the right people. Because, in, in this day and age people are afraid to talk. * * * I feel very comfortable here because he's [Errichetti's] here. That's the only reason I'm here." (*Id.* at 12-13.) These statements, combined with his acceptance of $50,000 in cash in an envelope, belie Myers' claim, "At no time did I believe what I had done was improper." (*Myers* Trial Tr. 2905.)

Moreover, a recorded conversation among Errichetti, DeVito, and Weinberg immediately after Myers left with the bribe money suggests that Myers believed that the sheik did intend to come to the United States and did expect him to assist. Errichetti told DeVito and Weinberg that Myers wanted a list of the names of the family members of the sheik who would immigrate with him so that Myers could immediately begin entering the names of "the key people" in a register of longshoremen as a first step to "insure his friends." (*See Myers* Gov't Trial Ex. 6A, at 2.) Errichetti's insistent volunteering of this step, which Myers had presumably proposed to him in the few intervening minutes between the two meetings, cannot be reconciled with Myers' or Errichetti's contention that they were playacting.

Further, as the conversation turned to the issue of the reduction of the bribe payment from $100,000 to $50,000, the dialogue plainly shows an understanding that action by public officials would likely be required.

> WEINBERG: Now, can we make the rest for fifty? We'll have no problem. Just for starters. And then *when we tell 'em to go ahead they get the other fifty.*
>
> ERRICHETTI: You gotta give me ground rules.* * *
>
> WEINBERG: *As soon as they start,* they get the other half. You know at least we know they're starting it, they get it. *Soon as we tell 'em to go ahead, we'll give 'em the other half.*
>
> ERRICHETTI: *It is started.*
>
> WEINBERG: Like, *say we call him up tomorrow, right? Start making arrangements to get the, Yassir in. Alright?*
>
> ERRICHETTI: Yeah.
>
> WEINBERG: Then * * *.
>
> DEVITO: *And then they'll get more.*
>
> WEINBERG: * * * They'll get the other half. You don't get the fifty—(inaudible)." (*Id.* at 14, 15 (emphasis added).)[128]

(c) The Transaction with Representative Lederer

Roughly contemporaneously with the events leading to the August 22 Myers payoff, arrangements were also being made for the meeting with Representative Lederer. Errichetti first mentioned Lederer to Weinberg on July 29 in the same conversation in which he first named Myers. (*See Myers* Gov't Trial Ex. 19A, at 1.) Weinberg and Errichetti next referred to both Myers and Lederer on July 30 and July 31. (*See Myers* Gov't Trial Ex. 20A, at 1; *Myers* Gov't Trial Ex. 21A, at 2.) Errichetti discussed both Myers and Lederer in his August 5 meeting with Weinberg and DeVito. (*See Myers* Gov't Trial Ex. 1A, at 2.) Both Errichetti and Criden named Lederer when they met with Weinberg and DeVito on August 7. (*See Myers* Gov't Trial Ex. 3A, at 1-2.) On August 8, Errichetti told Weinberg and DeVito that Lederer would be the next Congressman after Myers. (*See Myers* Gov't Trial Ex. 4A, at 2.)

---

[128] Later in the conversation Errichetti said that he did not want to "mention [any]thing about when we start," and that they should instead offer only the first $50,000. (*See id.* at 16.) Although this statement could be interpreted as consistent with the playacting defense, it is ambiguous and appears far more susceptible to three other explanations: (1) that Errichetti was not eager to emphasize the performance part of the bargain to nervous politicians or (2) that Errichetti preferred to pocket any subsequent $50,000 himself or (3) both of these.

On August 22 Myers refered to Lederer as a "close colleague." (*See Myers* Gov't Trial Ex. 5A, at 5; *Myers* Trial Tr. 2939-40.) The initial contacts with both Myers and Lederer were made by Johanson upon Criden's suggestion. Johanson reported to Cook after the Myers payoff that Lederer had agreed to discuss immigration with a representative of the sheik and to receive a $50,000 payment as a favor to Johanson. (*Lederer* Trial Tr. 657-58.) Criden testified that he understood that Johanson had asked Lederer to meet the Sheik in part so that Lederer would "be of some assistance to the Sheik in the event that he ever wanted to come to the United States." (Sel. Comm. Hrg., Sept. 14, 1982, at 63 (testimony of Howard L. Criden).) Criden testified further that Lederer had not met either Errichetti or Weinberg before September 11. *(Id.* at 62.) Thus, since Lederer knew only what Johanson told him, it seems clear that Lederer believed the sheik's representative was paying for real assistance. On September 11 Lederer met Criden and Johanson in New York, went to the Hilton Inn near Kennedy Airport, met Errichetti, who briefed him on his role, and accompanied Errichetti to a meeting in a hotel room with DeVito and Weinberg. (*See Lederer* Trial Tr. 661-62.) Errichetti testified that he had told Lederer that the plan was a charade. (*Jannotti* Pre-trial D.P. Tr. 1.122, 1.333-.334.) At the videotaped meeting, Lederer promised to introduce a private bill to assist the sheik and accepted a bag containing $50,000 in cash. (*See Lederer* Gov't Trial Ex. 12A.)

Thus, the Myers and Lederer transactions were parallel. Both Congressmen were suggested by Criden at or about the same time, approached by Johanson, briefed by Errichetti, and paid by DeVito. It is therefore significant that Lederer did not claim that he had been playacting, that Errichetti had told him it was all a charade, or that he had not intended to carry out his promise to help the sheik. Rather, Lederer claimed at trial that he had been entrapped and that he had not been predisposed to commit bribery. This flatly contradicts Errichetti's claim that he told Lederer to playact. (*See Lederer* Trial Tr. 1057-93, 1168.) Given the similarity of the Myers and Lederer transactions, and given the similarity of Errichetti's testimony about the Myers and Lederer transactions, Lederer's testimony strongly suggests that Errichetti lied about the Myers playacting, as well, and that Myers fully appreciated the criminality of the bargain he struck.

(d) The Noto Incident

At the *Myers* trial the defendants attempted to buttress their playacting defense by referring to an incident that had occurred on September 19, 1979 (*see* pages 434-35 *infra*), when, at Criden's and

Errichetti's behest, Ellis Cook had impersonated an official of the Immigration and Naturalization Service, Mario Noto, in an unsuccessful attempt to obtain bribe money from DeVito and Weinberg. Cook testified that Errichetti and Criden had told him that DeVito and Weinberg were in on the fraud, but that DeVito wanted to be able to report truthfully to the sheik that a meeting had taken place and that appropriate promises had been made. (*See Myers* Trial Tr. 1234-36, 1270-72, 1287-94, 1311-14.)[129] The defendants argued that this transaction corroborated their contention that they had been playacting during the Myers transaction. Criden's lawyer stated to the jury:

> What was the whole point of the Ellis Cook—Mario Noto thing? * * *. It was quite clear on evidence that can't be refuted that they all believed that Weinberg was setting this thing up just so they could relieve the sheik of some of his petro dollars. * * * It's quite clear not only that he [Cook] knew they were playacting but Mr. Weinberg fully expected a play act. That shows what these defendants also expected, and also believed and also had in their minds about the agent provocateur Mr. Weinberg * * *. He doesn't care if they bring in a ringer who looks like Mario Noto or not. (*Id.* at 3777-79.)

The facts surrounding the Noto incident, however, contradict the defendants' contentions. Errichetti himself testified *in camera* that Weinberg had not been a party to the Cook escapade. (*See Jannotti* Pre-trial D.P. Tr. 1.123.) Errichetti also testified before the Select Committee that Weinberg had not known beforehand that Cook was an imposter. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 216 (testimony of Angelo J. Errichetti).) Therefore, the incident suggests, contrary to the defendants' contention, that, whatever the defendants told each other about immigration charades, Weinberg and DeVito were not privy to those discussions.

(e) Criden's Transactions with Other Politicians in January 1980

Events of January 1980 even further undermine the playacting defense. According to the playacting scenario that defendants expound, they were told in the summer of 1979 that they would never see the sheik again and that the sheik would never require their assistance in immigration. In January 1980, however, Criden, Johanson, and Myers engaged in corrupt transactions with FBI Special Agents Michael Wald and Ernest Haridopolos, who were posing as other representatives of the sheik, Michael Cohen and Ernie Poulos, respectively. These transactions were predicated upon representations by the sheik's new representatives, whom defendants have not alleged they were told were bilking the sheik, that the sheik was increasingly certain to need assistance to immigrate. No evidence supports that Criden, Johanson, or Myers was surprised, alarmed, or concerned by this news. Under defendants' version of the facts, though, they should have been frightened at the prospect of being called upon to keep promises that they had been told they would never have to fulfill. To the contrary, the manner of their introduction to, and their eager participation in corrupt transactions with, Cohen and Poulos demonstrate that neither Criden nor Johanson nor Myers was playacting then or in August.

---

[129] This testimony put Cook in as ridiculous a position as Errichetti and Myers were in from their testimony that they had been playacting with no one else present. (*See* pp. 187-88, 191-92 *supra.*) After Cook testified that he understood that Errichetti, DeVito, and Weinberg all had known that he was impersonating Noto, Puccio asked, "What was your understanding of you[r] walking into a room and [re]presenting to three people who know who you were that you were somebody else, Mr. Cook?" (*Myers* Trial Tr. 1312-13.)

One incident in early January refutes the defendants' playacting allegations and suggests the true source for the playacting defense. On January 7, 1980, Representative John Murtha met with DeVito (Special Agent Amoroso) and Weinberg, at Criden's arrangement; but he refused an offer of money, indicating that he was "not interested in dealing that way" at that point. (*See Thompson* Gov't Trial Ex. 29A-1, at 26, 33.) After Murtha had left, Criden argued to DeVito that he, Criden, was entitled to money merely for having arranged the meeting. DeVito reminded Criden of a conversation months before in which Criden apparently had proposed to DeVito that they simply lie to the sheik about the involvement of public officials and split the money themselves:

> Howard, you said to me once before right, "[Tony, you] have all this money that [you're] passing out. [You] don't take any of it. [You] could of, [you] could of told the fucking sheik, hey, everything is all over, everything is all taken care of." (*Thompson* Gov't Trial Ex. 29A-2, at 11.)

Criden then suggested, "Well, you could do that right now, you met the guy * * *." DeVito responded, "I told you I'm an honorable guy with the people I deal with." (*Id.*) This conversation demonstrates that Criden, rather than Weinberg or DeVito, repeatedly proposed that they "playact" to defraud the sheik and that DeVito insisted to Criden that he would not cheat the sheik. It may reasonably be inferred from this exchange not only that DeVito and Weinberg never told the defendants to playact, but that the genesis of the playacting defense may have lain in the defendants' own efforts during the covert phase of the operation to convince DeVito and Weinberg to cheat their employer.

On January 11, 1980, Weinberg telephoned Criden to tell him that Poulos (Special Agent Haridopolos) and "one of our people from New York" (Michael Cohen, played by Special Agent Wald) were going to see him and wanted to meet Myers. (*See Jannotti* Gov't Trial Ex. 2A, at 2.) When Weinberg indicated that the Arabs were interested in building a hotel in Philadelphia, Criden responded that he and Johanson knew people who would be more useful than Myers in that regard. (*See id.* at 3-4.) Criden and Weinberg spoke twice on January 18 to discuss Criden's scheduled meeting with Cohen (Wald) and Poulos (Haridopolos) later that day; Criden never asked Weinberg whether Cohen and Poulos were in on the playacting fraud. In fact, Weinberg described Cohen as working directly for the sheik. (*See Jannotti* Gov't Trial Ex. 2B, at 3; *Jannotti* Gov't Trial Ex. 2C.)

In the subsequent meeting, Cohen explicitly told Criden:

> He [the sheik] is in a precarious situation at this point. Somewhat more precarious than many of us are willing to admit. * * * And ah, eh, trouble is right around the corner. * * * And he wants that taken care of, eh, he's been led to believe that asylum, uh, permanent residency can be facilitated easier if he has a base here. (*Jannotti* Gov't Trial Ex. 2D, at 9–10.)

Cohen also explained that the sheik wanted to ensure that no zoning or labor problems would interfere with his plans to build a hotel in Philadelphia. (*See id.* at 2–14.) Criden responded with offers of producing City Councilmen Johanson and Schwartz, as well as Myers. (*See id.* at 4, 14–20.) Cohen asked:

> What would be the tariff? * * * Give me a neighborhood. I know, I know what, what the tarriff is for a, ah, a congressman. (*Id.* at 20–21.)

Criden responded,

> I would say pretty close to the same note. * * * You're not going to get anything in writing * * *. I in my own mind am satisfied that we can deliver everything that you want for you ok. You have to be satisfied, so that you can satisfy [the sheik] that you're in a go position. (*Id.* at 21–22.)

Criden explained that Johanson and Schwartz were "[p]recisely and very closely intertwined" with Myers and Lederer. (*Id.* at 24.)

Criden took Johanson to meet Cohen and Poulos later the same evening. Cohen gave Johanson the same background explanation that Criden had received:

> **Cohen**: I work for a gentleman who, ah, has expressed some interest in Philadelphia. Now he's in a situation briefly, ah, in the Mid-East, that eh is somewhat secure today but it may not be secure tomorrow morning. It becomes less secure everyday, Lou and he, eh, is leaving, it's not a matter of, eh, "if" anymore, it's just a matter of "when."
>
> **Criden**: It's just a matter of "when" * * *. (*Jannotti* Gov't Trial Ex. 2E, at 7.)

Johanson expressed no surprise or consternation at this information. He promised to "[d]eliver you the majority of the votes that you need to straighten out any problems you have with the City Council" (*id.* at 49) and accepted $25,000 (*see id.* at 72–80). Criden and Johanson then agreed to try to arrange for Cohen to meet and to pay off Schwartz and Jannotti. (*See id.* at 81–88, 93–95.)

Cohen and Criden spoke by telephone on January 21, 22, and 23 and arranged a meeting with Schwartz for January 23. (*See* [Deleted]; *Jannotti* Gov't Trial Ex. 2F; *Jannotti* Gov't Trial Ex. 2G.) At the meeting, Cohen gave Schwartz the same explanation of the sheik's needs (*see Jannotti* Gov't Trial Ex. 2H, at 7–9), and Schwartz gave adequate assurances (*see id.* at 79–80). After Schwartz left, Cohen and Criden discussed what assistance Myers and Lederer could give on the hotel project and on the immigration legislation. (*See id.* at 86–88.) Cohen proposed that a meeting be arranged for them with the sheik and suggested that, at a minimum:

> I just want to introduce myself and tell him that, uh, things might be coming to a head in a short period of time. And they might be called on to perform, uh, you know, what they have been compensated for. * * * (*Id.* at 102; *see id.* at 107–08.)

By the following afternoon, Criden had arranged separate meetings for Jannotti and Myers later that day. (*See Jannotti* Gov't Trial Ex. 2I.) Criden told Myers that he had impressed DeVito and Weinberg in August and that another representative of the sheik was in Philadelphia and wanted to meet him. (*See Myers* Trial Tr. 2743, 2812–13.)

At the Jannotti meeting, Jannotti received the standard pitch, made the appropriate promises, and accepted $10,000. (*See Jannotti* Gov't Trial Ex. 2J.) Criden escorted Jannotti out and returned to wait for Myers to arrive. (*See id.* at 46; *Jannotti* Gov't Trial Ex. 2K, at 15.) Myers arrived and met Cohen and Poulos a few minutes later. (*See Myers* Gov't Trial Ex. 7A.) The juxtaposition of Criden's corrupt transactions with Philadelphia city councilmen and the Myers meeting indicates that Criden clearly understood the sheik's corrupt interest in Myers and intended to assist them. Moreover, Criden's total lack of fear or reluctance in arranging for Cohen to meet Myers and to tell him that he might shortly be called on to perform in accordance with his prior promises belies Criden's playacting claims.

(f) Myers' Activities in Late January 1980

Similarly, Myers cannot explain why he agreed so readily to meet another of the sheik's representatives, if, as Myers testified, Errichetti had told him in August "point blank that you will never see these people again. Don't worry about that." (*Myers* Trial Tr. 2814.) One would expect Myers to have been frightened upon receiving such a call five months later. Instead, however, Myers gave the following response when he was cross-examined by Puccio at trial:

> Q: And you attended that meeting [January 24, 1980], let's say, if I may say so, without any hesitation or mental reservation, is that correct?
>
> A: Yes. (*Id.* at 2972–73.)

According to the defendants' playacting scenario, Myers believed that Weinberg and, to some degree, DeVito were defrauding the sheik. Clearly, then, Myers should have been insistent on learning whether Cohen and Poulos were similarly disloyal; he should have feared the prospect of meeting any of the sheik's loyal employees who would have expected him to deliver on his August promises. But Myers admitted in testimony that he had not known whether Cohen was disloyal to the sheik (*see id.* at 2792–93), and there is no evidence suggesting that either Myers or Criden was at all apprehensive or alarmed. To the contrary, the following exchange occurred:

> CRIDEN: We made an impression.

> **Cohen**: Yeah. You did. Ah, he's [the sheik's] been led to believe that the * * * you're the gentleman, he, he puts his faith in, that, that he can deal with and he's happy with and feels very secure * * * . Ah, ah I spent some time, in D.C., an earlier this week and received news which has been relayed back and ah the situation, ah that you discussed with our other associates, ah, is worsening. It really is. And I personally feel from what I've learned recently that ah my employer has a very short period of time to remain where he is. Ah can you give some short, brief overview, a quick education, on what's gotta happen if you receive a telephone call that he's gonna come over here with his passport on a visa and get into this country ah * * * .
>
> **Myers**: Well see like I had to explain the, back then, ah the problem you have, that I see, it's depending on who this individual is and, you know, what kind of heat is on this or if there's any and I don't know * * * .
>
> **Cohen**: And I think that one of the reasons that he wants to come here is the impressions that he's received, ah probably because of you * * * .
>
> **Myers**: Well, you know, each individual that deal with, dealing with the State Department and immigration matters, ya know, they're each individually handled. And I had ah made ah * * * made it known that I have some friends in the State Department. But you're dealing, ya know, I don't know what the circumstances will be that day if that call rings. And more, hon, honestly, not to give you a short answer, I'll have to take it from that, from that point to see actually how I should handle it. * * *
>
> **Cohen**: Would it be fair when I go back next week to report that I met with Mr. Myers and he said yes, he has this influence, etc. , and he's willing to use it?
>
> **Myers**: I'm willing to use my influence. The only thing that I can be very honest with * * * (inaudible) * * * and I'll tell ya this up front, I can't go on a Kamikaze mission * * * . (*Myers* Gov't Trial Ex. 7A, at 40–42, 69.)

After a discussion of the Arabs' investing in Philadelphia to give Myers a cover to help them in Congress, Myers complained about his diminished share of the August payoff that had resulted from the reduction from $100,000 to $50,000:

> Let me, just say, tell ya one thing one guy that isn't taken care of is me. 'Cause I got screwed on the, on the last time I met somebody * * * . And ah I was supposed to ah, the end of the day, be ah, ah be 25 ah times ah happier than what I was when I went there. And I wasn't when I returned to my own city * * * . If you, if you got to give a guy a few bucks to get him involved, ya know, ya ain't gonna, ya, ah, whose gonna hedge at at at that kind ah there's no limits is it? * * * I felt a little hurt about it, hurt to a degree that I was misled. I, I mean, I made the trip on the agreement. (*Id.* at 117, 118, 127, 132.)

Myers and Cohen then struck a new bargain (*id.* at 158), in which Myers was to receive the $35,000 he claimed he was owed from August for assisting with immigration matters and $50,000 additional for using his influence "in city government, * * * on the docks and with any organized type criminal enterprise problem * * * ." (*Id.* at 138; *see id.* at 137, 150–54, 162–64.)

Myers' attempts at trial to reconcile his appearance and conversation at the January 24 meeting with his playacting defense are thoroughly incredible. He variously explained his behavior at the meeting as the product of his "want[ing] the conversation to fall in line with the first meeting" (*Myers* Trial Tr. 2751); wondering "whether Mr. Wald was aware of Mr. Weinberg and what already happened" (*id.* at 2749); being "interested in the development of the City" of Philadelphia (*id.* at 2750); and getting intoxicated (*id.* at 2754, 2755, 2757, 2768, 2779, 2781, 2787A). As for Cohen's role in the fraud being perpetrated on the sheik by his employees, Myers testified that he "took it [Cohen] didn't know about the play acting after the meeting was over." (*Id.* at 2989.) A few minutes later, however, Myers testified that he had concluded that Cohen "was in some way trying to steal something off the sheik." (*Id.* at 2996.)

Myers met with Cohen and Poulos in a videotaped meeting the following evening, January 25, 1980. Myers discussed the possibility of his arranging for Cohen (Special Agent Wald) to meet and to pay off two politicians whom he had named to Cohen the previous day: a Congressman and a state legislator. In the course of a prolonged discussion about these two public figures, Myers carefully distinguished between them, in the process manifesting his understanding of the corrupt nature of his own transaction with Cohen. (*See* [Deleted]) The following dialogue ensued regarding the state legislator:

> MYERS: I know him very well, very well * * * I mean I can bring him in.
>
> COHEN: Give me a figure.
>
> MYERS: * * * And I can talk to him like this just like we're talking and can sit him right down and, you know * * *. ([Deleted])

In contrast, Myers repeatedly warned Cohen not to attempt to arrange a corrupt transaction with the Congressman:

> Now [he] ain't the type of guy that I would say, that I could bring him into this kind of a meeting. [He] wouldn't come to this kind of meeting * * *. I tell you, [he] would not come to this kind of a meeting. ([Deleted])

Myers and Cohen talked several times by telephone on January 29 (*see Myers* Gov't Trial Ex. 9A), on January 30 (*see* [Deleted]), and on January 31 (*see* [Deleted]), both to reconfirm the amount of money that Cohen had agreed to pay Myers and to attempt to arrange a meeting between Cohen and the state legislator. In the first January 31 conversation, Myers served the function of a middleman and Cohen instructed him on how to prepare the state legislator; thus, the message never passed through Weinberg, Criden, Johanson, or Errichetti, but was given, in a recorded conversation, directly from the undercover special agent to Myers as follows:

> **Myers**: Alright, now what do you want me to tell him to ah pick up something there or what.
>
> **Cohen**: Well just give him the figure see if it's ok with him right.
>
> **Myers**: Yeah.
>
> **Cohen**: And ah, the same type of thing you and I discussed ya know, the kind of problems he, he uses the office he has now and the potential office [the state legislator was running at the time for a seat in the U.S. House of Representatives] to kind of help smooth things out, his influence and so forth, ah ah should we wind into a bind, his vote, ya know, just as you and I discussed.
>
> **Myers**: OK. ([Deleted])

At the subsequent meeting with the state legislator, Cohen explained the purpose of the meeting:

> **Cohen**: I work for a gentleman, eh, who is substantially wealthy. Ah, he is relocating to this country because of pressures in the mideast, . . . [T]he political climate being what it is, the relocation is going to take place shortly to this country and we need, eh, we need friends here.
>
> **Myers**: Mike, that's basically what I explained to him, you know. ([Deleted]) [130]

In light of this explicit language, Myers' claim that he always believed that there was no *quid pro quo* must be viewed as pure prevarication.[131]

(g) Defendants' Statements Outside of the Undercover Operation

Even apart from the conclusions that can be drawn from defendants' behavior over the course of six months of recorded telephone conversations and meetings, their own statements off-camera both during and after the covert phase of Abscam belie their claims of playacting. For example, a close friend of Criden's, Bernice Rush, told the FBI in an interview on November 28, 1980, that Criden had told her in August 1979 that he had become mixed up in illegal activities, including bribery. (*See* [Deleted]) Criden testified that he recalled having told that to Rush, but thought he had done so sometime after the Lederer payoff in September 1979. (*See* Sel. Comm. Hrg., Sept. 14, 1982, at 16–17 (testimony of Howard L. Criden).)

When the defendants were interviewed by agents of the FBI on February 2, 1980, the day Abscam became public, they made statements that are uniformly incriminating. Johanson indicated that he had realized since July 1979 the seriousness of the influence peddling activity he was involved in and that he had had many sleepless nights over it. (*See* [Deleted]; *Myers* Trial Tr. 2644–45, 2651–52.)

---

[130] The state legislator did not make sufficient assurances that he would help, and Wald therefore did not offer him money. (*See* [Deleted])

[131] Myers testified at trial that he attended the January 25 meeting to learn what had happened in the meeting the previous night, to obtain investment in Philadelphia, and to see if Cohen (Special Agent Wald) behaved differently in Criden's absence. (*See Myers* Trial Tr. 3001–02.) Myers did not attempt to explain his conduct on January 29, 30, or 31.

On February 2, Myers was expecting Poulos to deliver to his home the $85,000 that Cohen had agreed to pay him. (*See id.* at 2587-88; *Myers* D.P. Ex. 23A, at 54-56, 59-62.) Myers falsely denied to the FBI agents who appeared in Poulos' place that he knew any individual named Mel Weinberg, Tony DeVito, or Michael Cohen (Wald's undercover name). (*See Myers* Trial Tr. 2660-62; [Deleted]) [132]

Criden, meanwhile, was meeting DeVito (Special Agent Amoroso) and Weinberg in a room at the Hilton Inn at JFK Airport on February 2. (*See Thompson* Gov't Trial Ex. 37A.) Weinberg had arranged the meeting with Criden by telephone on January 25, purportedly to pay Criden and to introduce him to the sheik. (*See Thompson* Gov't Trial Exs. 35A, 36A.) At the meeting, DeVito used the sheik's supposed imminent arrival as an excuse to recite with Criden the events of the preceding six months:

> DEVITO: Listen, he'll be here probably in a little while, so, I wanted to run by you something. And that way, I, uh, * * *.
>
> CRIDEN: Who's he?
>
> DEVITO: The sheik, who's he.
>
> CRIDEN: Oh, the boss.
>
> DEVITO: Yeah, I told you on the phone, I told you.
>
> CRIDEN: Oh, I * * * I thought he * * * I didn't know he said he didn't know for sure.
>
> DEVITO: Yeah, yeah, so, uh, I want to go over with you what I told him, so, this way when you talk to him he'll know, OK * * * (*Thompson* Gov't Trial Ex. 37A, at 2.).

DeVito then recapitulated Criden's presence during the asylum discussion on the yacht on July 26 and Criden's and Errichetti's agreement to locate politicians to assist, and Criden agreed to the summary. (*See id.* at 2-3.)

By any measure of the playacting scenario, Criden should have been terrified at the prospect of meeting the sheik, whom he claims he had been told he would never see, in the presence of the sheik's two disloyal embezzlers, DeVito and Weinberg. To the contrary, Criden responded, "Oh, super," when Weinberg first told him that DeVito wanted to introduce him to the sheik. (*Thompson* Gov't Trial Ex. 35A; *see Thompson* Gov't Trial Ex. 37A, at 2, 5, 17-18.)

Criden's testimony before the Select Committee suggests that even he is not a firm believer in the playacting scenario. When Criden was asked to distinguish whether he had been playacting from whether he merely had understood that the probability of the contingent *quid pro quo* was low, he was unable to remember which had governed his understanding at the time.

> Q: As best you can recall, did he [Myers after the August 22 payoff meeting] say that Mayor Errichetti had said, "Nothing is ever going to happen," or did he say that Mayor Errichetti said, that, "Probably, nothing will ever happen?"

---

[132] Myers testified unbelievably at trial that he lied to the FBI agents because they had not told him why they were asking those questions and because he feared that the sheik might kill Cohen or others of his employees. (*See Myers* Trial Tr. 3223-25.)

> A: I really could not—it is three years ago, and it is very difficult to remember the finer points of that. I really cannot remember. (Sel. Comm. Hrg., Sept. 14, 1982, at 11 (testimony of Howard L. Criden).)

Similarly, at the Select Committee's hearing, Criden flatly contradicted, until prompted by his counsel, his own defense in the *Myers* case:

> Q: In all of these contacts you had with members of Congress that you eventually set up meetings for, is it your opinion that each of them knew, as they went to that meeting, that that meeting was to present them with an opportunity to receive some financial gain in return for some service that they would provide?
>
> A: I think each situation stands on its own. With regard to Congressman Myers, I would say that the answer to that was yes, sir.
>
> Counsel for Witness: May we have a moment?
>
> Q: Yes.
>
> (Witness conferring with counsel.)
>
> A: In the Myers situation, I do not believe, as I recollect it, that he ever thought he was going to have to be called upon to perform a service, * * * . (*Id.* at 85.)

Finally, Criden acknowledged that he had fully understood that he was involved in criminal activity over the course of the conspiracy:

> Q: Mr. Criden, I understand what you are saying about it all being unreal. I can understand that. But you certainly realized, or you had to have some suspicion, when a Congressman takes that kind of money in cash, that whatever is being done to the giver, that the taker is violating some kind of a law. You had to know that.
>
> A: At some stage of the game, I did.
>
> Q: You had to know that, Mr. Criden.
>
> A: Yes, sir, yes, sir. But it is like being a little bit pregnant at that stage of the game. We were already well into the situation. (*Id.* at 89–90.)

After examination of the record discussed above, which greatly exceeds the amount of material given to the jury in the *Myers* case, the Select Committee has concluded unequivocally that the jury correctly resolved the factual playacting question against Myers and his codefendants, Errichetti, Criden, and Johanson. The Select Committee has concluded further that a substantial portion of the testimony given by Myers, Errichetti, Criden, and Johanson in connection with this question was perjurious and casts serious doubt on every contested assertion of fact they have made in the course of the Abscam proceedings. It appears that these are four desperate men who, when caught red-handed in the commission of felonies, were willing to try to concoct a tale bearing only a vague resemblance to the facts they knew to be true.

Moreover, the defendants raised numerous claims of misconduct by Weinberg in an attempt to undermine Weinberg's credibility on the playacting issue. Because the Select Committee has resolved the playacting factual issues against the defendants, it does not consider those allegations against Weinberg to be germane to the defendants' guilt *vel non* of the offenses for which they were convicted.[133] Of course, resolution of the defendants' allegations against Weinberg remains relevant to the Select Committee's duty to examine the propriety and efficacy of governmental conduct in Abscam and other undercover operations.

B. Allegations Regarding the Investigation of Senator Harrison A. Williams

On May 1, 1981, a jury in the United States District Court for the Eastern District of New York convicted United States Senator Harrison A. Williams, Jr., of conspiracy, bribery, and conflict of interest. On December 21, 1981, United States District Judge George C. Pratt denied Senator Williams' motions to dismiss, including those brought under the due process clause of the fifth amendment to the Constitution.

During that interval the Senate Select Committee on Ethics conducted an investigation of Senator Williams and, on September 3, 1981, reported a resolution to expel him from the United States Senate. On March 11, 1982, before the Senate voted on the resolution, Senator Williams resigned his seat.

Senator Williams and his codefendant, New Jersey lawyer Alexander Feinberg, have alleged that the FBI committed several improprieties in the course of the Abscam investigation. The Ethics Committee considered some of those allegations.[134] Most of them were considered and rejected by Judge Pratt, whose decision is currently on appeal to the United States Court of Appeals for the Second Circuit.

In this report the Select Committee does not reexamine the Ethics Committee's conclusions regarding the impropriety of Senator Williams' conduct under the Rules of the United States Senate. Nor does the Select Committee offer an opinion on the legal contentions of entrapment and due process that Senator Williams and Feinberg have presented to the courts. Rather, in accordance with Senate Resolution 350, this report addresses the allegations of improper law enforcement investigative practices in connection with the Abscam investigation of Senator Williams, irrespective of whether those practices rose to the level of entrapment or of due process outrageousness.

The distinction between the purposes and focus of this report and those of the Ethics Committee and of the courts is important. For example, one of the major contentions made by Senator Williams is that there was no basis for the investigation into his activities. The principal issue that contention presents to a court is whether, within the meaning of the entrapment doctrine, Senator Williams was predisposed to commit the crimes with which he was charged. For the Select Committee, on the other hand, the question presented is whether a reasonable basis existed for each investigative step taken by the FBI regarding Senator Williams and his associates. [135] Thus, the legal rules of evidence that govern and affect the outcome of the legal proceedings do not apply to the Select Committee's inquiry.

---

[133] The Select Committee has purposely not relied in any respect upon Weinberg's testimony in the various court proceedings and before the Committee regarding the playacting allegations. Weinberg did testify repeatedly and consistently that he had never told Errichetti or Criden to tell Myers to playact. (*See, e.g. Myers* Trial Tr. 2120-21; Sel. Comm. Hrg., Sept. 16, 1982, at 119-21 (testimony of Melvin C. Weinberg).) Nevertheless, because the Select Committee believes that Weinberg has lied repeatedly while testifying on numerous other issues, including his sharing of bribes and his deliberate creation of false evidence (*see* pp. 142-49 *supra*), it has concluded that, whenever possible, Weinberg's testimony should not form the basis for conclusions of the Select Committee.

[134] The Ethics Committee took the position that, in deciding whether a Senator should be expelled, it was not bound by standard of due process outrageousness or by any judicial finding that Senator Williams' rights had been violated. The Committee found that—regardless of the government's actions—Senator Williams' conduct had been improper. (S. Rep. No. 97-187, 97th Cong., 1st Sess. 90-95 (1981).)

Similarly, the Select Committee did not investigate the alleged "coaching" of Senator Williams to determine whether, as a legal matter, his will was overborne to such an extent that his conviction cannot be upheld. Rather, the Select Committee investigated that allegation to determine whether the conduct in question reflected inadequate management, supervision, and control of the informant, of the undercover special agents, and of the operation, generally; inadequate coordination between the FBI and other components of the Department of Justice; or improper targeting.

Based upon its review of the transcripts of conversations relevant to the investigation of Senator Williams; its review of the record of the judicial and congressional proceedings against Senator Williams—his trial, the separate due process proceeding held after his trial, all briefs and legal memoranda filed either in court or before the Senate, the hearings before the Ethics Committee, and the floor debate (including exhibits) on his expulsion—and its interviews of many of the participants in the investigation, the Select Committee concludes that the government possessed an adequate predicate for each step of the investigation. The Select Committee also concludes, however, that serious investigatory deficiencies occurred in the FBI's investigation of Senator Williams. The session on June 28, 1979, in which Senator Williams was coached on what to say to the sheik was particularly egregious. Other matters of concern include the excessive pressure applied by Melvin Weinberg to have Senator Williams and his business colleagues keep Senator Williams' interest in the titanium venture hidden; the length of time during which Senator Williams was pursued; the number and variety of opportunities to engage in illegal activities offered to Senator Williams; and the magnitude of the inducements offered to Senator Williams. The Select Committee is also troubled by erroneous factual statements made in an internal Department of Justice memorandum describing the early stages of the investigation and the basis for suspecting Senator Williams of culpable conduct, and by the failure, or perhaps the purposeful refusal, of attorneys in the Strike Force for the Eastern District of New York to keep federal prosecutors in New Jersey properly informed about the investigation. [136]

---

[135] Although it is not a judge of whether Senator Williams was legally entrapped and therefore makes no finding in that regard, the Select Committee is concerned with, and it does address elsewhere in this report, the proper formulation of the entrapment defense. (*See* pp. 362–77 *infra.*) *infra.*)

[136] This section of the report addresses only the allegations of government impropriety that relate directly to the Williams investigation. Senator Williams made many allegations—several

Continued

1. Factual Predicate for Initiating the Investigation

The Select Committee finds no evidence that Harrison A. Williams, Jr., was improperly or unfairly targeted. The FBI did not initiate the contact with Senator Williams and his associates; rather, they first contacted the FBI.

In January 1979 Harrison Williams, the senior United States Senator from New Jersey and a member of the Democratic Party, was a political associate of Angelo Errichetti, the Mayor of Camden, New Jersey, a state legislator, and a member of the Democratic Party. Early that month, Senator Williams and Errichetti met in connection with the proposed rebuilding of the United States Navy vessel *Saratoga* in the Philadelphia Navy Yard. During that brief meeting in Errichetti's office, Errichetti mentioned that he was in contact with some Arabs who had millions of dollars they wished to invest. Shortly thereafter, Senator Williams called New Jersey attorney Alex Feinberg, his long-time friend and advisor, and said, "Alex, get ahold of Eric[hetti] right away and let's see what the hell's going on." (*Wms.* Gov't Trial Ex. 2A, at 27, Sen. Comm. Print, Pt. 6, at 29.) Feinberg then called Errichetti and informed him that Feinberg and a New Jersey businessman named Henry A. "Sandy" Williams, III (who was not related to Senator Williams) were interested in contacting the Arabs to obtain financing for a proposed titanium mine venture in Virginia. (*See id.*)

(a) Initial FBI Contact with the Senator's Associates

The FBI first became aware of Senator Williams and his business associates in the Abscam context on January 11, 1979, when Melvin Weinberg and Special Agent John M. McCarthy, posing as Jack McCloud of Abdul Enterprises, went to Cherry Hill, New Jersey, to meet with Mayor Errichetti on Abscam matters unrelated to Senator Williams. According to a report prepared on that same day for FBI files by Special Agent McCarthy, he contacted Errichetti at the Cherry Hill Hyatt House Hotel, where Errichetti introduced him to Feinberg and, in an aside, told McCarthy that Feinberg was the "bagman" for Senator Williams. In another report prepared the same day, McCarthy states that he contacted Feinberg at the Hyatt and that Feinberg described himself as being very close to Senator Williams, who was interested in seeing the titanium venture succeed and who would do what was necessary to see that it did so.

Subsequent interviews with FBI personnel have revealed that these two reports contain factual errors with respect to dates and participants. The meeting during which Mayor Errichetti referred to Feinberg as Senator Williams' "bagman" actually occurred on January 10, 1979, not January 11. The only participants were Special Agent McCarthy and Mayor Errichetti. At that meeting, Errichetti agreed to introduce McCarthy to Feinberg on the following day. On January 11, 1979, McCarthy and Weinberg met with Errichetti, Feinberg, and Sandy Williams to discuss the titanium ven-

---

of which were debated by the Senate in March 1982—that go to Abscam generally, such as bribe-sharing and prosecutorial conflicts of interest. These allegations are addressed in other sections of the report.

ture. FBI officials, including McCarthy, have told the Select Committee that, apart from these substantial errors regarding dates and participants, the two contemporaneous reports accurately describe the meetings of January 10 and 11, 1979. Special Agent McCarthy could offer no explanation for the existence of such significant errors in two brief reports that he had prepared within 24 hours of the two meetings described in the report.[137]

Based upon the information provided by Errichetti on January 10, 1979, the FBI was justified in meeting with Feinberg and Sandy Williams on January 11. Errichetti had already unequivocally shown himself to be corrupt;[138] he had used language suggesting that Feinberg was corrupt; he had stated that Feinberg wanted to discuss a business venture with the Abdul Enterprises representatives whom Errichetti believed to be corrupt; and the meeting with Feinberg was not to consummate an illegal transaction, but merely to ascertain whether Feinberg was interested in a legal venture or in an illegal venture.

The nature of the FBI's January 11 meeting with Feinberg and Sandy Williams is somewhat like a meeting in a typical sting operation. For example, in a sting operation in which the FBI spreads the word that an ostensibly legitimate warehousing facility is also fencing stolen goods, the undercover agents do not immediately know whether a person who walks into the facility is there for licit or illicit purposes. If they could not even talk to the customer without prior knowledge of an illicit purpose, they would apprehend only criminals foolish enough to walk in and announce at once their criminal intent. Similarly, in Abscam, when Mayor Errichetti stated that Feinberg and Sandy Williams wanted to discuss a transaction with the undercover agents, the agents agreed to the meeting to ascertain whether the proposed transaction was to be licit or illicit.

Moreover, Errichetti's naming of Senator Williams was unimportant to the propriety of the FBI's actions. If Errichetti had claimed only that Feinberg was corrupt and wanted financing from Abdul Enterprises, which Errichetti believed to be corrupt, sound investigative policy would have required McCarthy to meet with Feinberg. If undercover operations are to be sanctioned, this minimal amount of intrusion into the life of a person as to whom there is no other inculpatory evidence must be permitted.

---

[137] The government's confusion with respect to the events of January 10–11, 1979, has been even more substantial than is described in the above text. The government's brief in the court of appeals in the *Williams* case asserts that on January 10, 1979, Errichetti told Weinberg that Feinberg was Senator Williams' bagman. (*Wms.* Gov't Brief 21.) Similarly, while testifying in the *Williams* trial, Weinberg volunteered that on January 10, 1979, Errichetti had referred to Feinberg as Senator Williams' bagman. (The court sustained a defense objection and ordered the volunteered testimony stricken.) Errichetti testified to the Select Committee that he was sure he had made the "bagman" reference in Weinberg's presence. Nevertheless, FBI representatives, including McCarthy, now maintain that Weinberg was not present when Errichetti told McCarthy on January 10 that Feinberg was Senator Williams' bagman.

It is conceivable, of course, that Weinberg and Errichetti had another conversation on January 10, 1979, that was not recorded or reported to the FBI by Weinberg. Whatever the explanation for the confusion and for the errors in the written reports might be, the confusion and the errors sharply demonstrate the importance of recordings, of thorough and accurate reporting, and of informant supervision and control. They also demonstrate the unreliability of even contemporaneous documents in the Abscam investigation.

[138] *See* pp. 406–10 *infra*.

(b) Continuation of the Investigation

During the January 11, 1979, meeting, Feinberg discussed the titanium venture, stating that Senator Williams was a close friend of Sandy Williams and was anxious to have the mine funded. (*Wms.* Trial Tr. 618.) Weinberg testified that during this meeting Feinberg had told him, in an aside, that Senator Williams would share in Feinberg's interest (*see id.* at 1232), but McCarthy's contemporaneous reports do not mention that Weinberg ever informed the FBI of that alleged fact.[139]

On January 20, 1979, McCloud (Special Agent McCarthy) paid Errichetti a $25,000 bribe to assist Abdul Enterprises in obtaining a gambling license and establishing a casino in Atlantic City, New Jersey. ([Deleted]) [140] During the course of that meeting, Errichetti told McCloud that Senator Williams was pleased that Abdul Enterprises was interested in the titanium mine:

> ERRICHETTI: Pete Williams called, was very pleased at the way you handled your clients, Alex Feinberg, and the other fellow.
>
> McCLOUD: Right, right.
>
> * * * * * * *
>
> ERRICHETTI: I haven't talked to anybody. Kept a low profile. I just kept quiet waiting for you to call, but I wanted to express to you that Pete Williams was very gratified.
>
> McCLOUD: Good.
>
> ERRICHETTI: Very pleased with the whole operation. And he'll do everything he can, whatever, whatever the end result comes, whatever you want to do. That's it. That's the end of the conversation. There'll be no more said and that's the end of it. ([Deleted])

The next recorded mention of Senator Williams or his associates occurred in early March 1979. Abdul Enterprises was dealing at that time with a man named Edward Ellis, who was seeking financing to rebuild the Garden State Racetrack in southern New Jersey.[141] In a telephone conversation with Weinberg on March 1, 1979, Ellis stressed how close Feinberg was to Senator Williams, referring to Feinberg as Williams' "man" and "boy" and telling Weinberg how Feinberg had served as best man at Senator Williams' wedding. ([Deleted], *reprinted in* 128 Cong. Rec. S 1497–98 (daily ed. Mar. 3, 1982).)

On March 5, 1979, Ellis met with Weinberg, Carol DeRosa (Special Agent Carol Kaczmacek), and McCloud (Special Agent McCarthy). During the meeting Ellis referred to Feinberg several times as Senator Williams' "bagman," and he stated that through Feinberg he had already paid a $100,000 bribe to Senator Williams. ([Deleted], *reprinted in* 128 Cong. Rec. S 1498–1500 (daily ed. Mar. 3, 1982).)

---

[139] Given the substantial questions this investigation raised about Weinberg's credibility, this report does not rely on his unsubstantiated statements for its conclusions.

[140] The omission of a citation to a confidential document is identified by "[Deleted]." *See* pp. V–VI *supra*.

[141] The Ellis transaction is discussed in depth at pp. 285–306 *infra*.

Three days later, on March 8, 1979, Weinberg and Tony DeVito (Special Agent Anthony Amoroso) met with Errichetti in Atlantic City to discuss a variety of topics, including the racetrack. When told what Ellis had said on March 5, Errichetti stated that Ellis had lied:

> WEINBERG: Yeah, alright. Now, the reason I want to meet with Feinberg is a friend, Ellis, had told Jack that Feinberg is the bagman for Williams and Williams is behind it and they agreed to pay [for the racetrack license]. Now, does Feinberg know about it?
>
> ERRICHETTI: No, Feinberg ain't nothing, he's my front, he's Williams' bagman, that's true.
>
> WEINBERG: Yeah.
>
> ERRICHETTI: That's what I told Ellis to say. ([Deleted], *reprinted in* 128 Cong. Rec. S 1502 (daily ed. Mar. 3, 1982).)

Errichetti stated that Ellis did not even know Senator Williams.

> ERRICHETTI: Ellis don't even know each other. They do but they don't. He said send somebody the fuck up here, remember? So Feinberg went up there instead of uh . . . another politician.
>
> * * * * * * *
>
> ERRICHETTI: Pete Williams, get him out of here.
>
> WEINBERG: Why? He's dangerous?
>
> ERRICHETTI: U.S. Senator?
>
> WEINBERG: Yeah.
>
> ERRICHETTI: You don't go handing money out to a U.S. Senator. I could probably hand it to Williams faster . . . .
>
> * * * * * * *
>
> WEINBERG: Jack believes its Williams.
>
> DEVITO: He [Ellis] oversold.
>
> ERRICHETTI: He oversold (inaudible). ([Deleted], *reprinted in* 128 Cong. Rec. S 1502 (daily ed. Mar. 3, 1982).)

The three men then agreed that it was lucky they had found out that Ellis had lied, or McCloud might have mentioned a payoff to Williams:

> ERRICHETTI: Oh Jesus, U.S. Senator, forget it.
>
> DEVITO: Well, I'm glad we've gone over this, because otherwise he, you know, if we would've . . .
>
> ERRICHETTI: First of all, most guys, they'd love to do it, but they won't get near it. That's why they would come to me or somebody and say, "Mayor, we would appreciate it . . . ." But he's tickled to death about the fucking mine. Pete Williams called me three times last week. I said everything's gonna be O.K. What do I know about the fucking mine. ([Deleted], *reprinted in* 128 Cong. Rec. S 1502 (daily ed. Mar. 3, 1982).)

Errichetti then reasserted that Feinberg was Senator Williams' bagman: "[Alex] and Pete Williams have a special relationship; it's common knowledge that he's his bagman."[142]

Eventually, Feinberg joined the meeting. When told what Ellis had said, he contended that Ellis was an "idiot" and did not even know Senator Williams. Feinberg advocated taking care of the racetrack problems in a "legitimate" way. The context, however, suggests that by this he meant a way that exposed them to less risk, such as channelling money through devices such as legal fees:

> **FEINBERG**: I can do the thing legitimately, and he pays me a legal fee and don't worry about Pete Williams. Williams is my, for Christ's sake, like a blood brother to me, and I represent him in this mining thing. He pulled me into that. Everything he gets into, he pulls me into, O.K.? Because I look out for his interests. ([Deleted], *reprinted in* 128 Cong. Rec. S 1504 (daily ed. Mar. 3, 1982).)

The discussion later shifted to the titanium mine:

> **FEINBERG**: I'm representing him on that deal [the titanium mine]. See, you know how I got into that: Williams. Whenever anybody goes . . . see, (inaudible) he's a friend of Williams. Whenever anybody . . . I'm, I'm gonna brag about this, and he can verify it.
>
> **ERRICHETTI**: Look, I know what he's gonna say. (laugh)
>
> **FEINBERG**: He, he, he says, "Well, I want Alex in this. I want Alex in . . . I want Alex to run it." We're, we're like, is that right?
>
> **ERRICHETTI**: How many years? Twenty-four years?
>
> **FEINBERG**: Twenty years . . .
>
> * * * * * * *
>
> **FEINBERG**: . . . we've been together.
>
> **WEINBERG**: Does Williams got a piece of this mine?
>
> **FEINBERG**: He's gonna have a piece of the mine, yeah.
>
> **WEINBERG**: Cause he don't, he doesn't show on here.
>
> **FEINBERG**: Ah . . . he can't show.
>
> **WEINBERG**: I was just wondering how . . . .
>
> **ERRICHETI**: . . . hired a good lawyer.
>
> **WEINBERG**: Cause you don't show in there either.
>
> **FEINBERG**: No, I know. I can't show. I can't show Pete or myself. But we're gonna have a piece. O.K.? Now . . . .
>
> **WEINBERG**: As long as we understand.
>
> **FEINBERG**: That's right. Now I'm gonna tell you . . . He called me yesterday, and I told him I was gonna see you about something entirely different. I didn't say what. (*Wms.* Gov't Trial Ex. 1A, at 1, 2, Sen. Comm. Print, Pt. 6, at 1, 2; 128 Cong. Rec. S 1505 (daily ed. Mar. 3, 1982).)

The participants then agreed, upon Errichetti's suggestion, that Senator Williams should be invited to attend the party that had been planned to take place on March 23 on the Abdul Enterprises yacht in Florida.

---

[142] The quoted language does not appear in the FBI's transcript of the March 8, 1979, meeting. That transcript reads "(Inaudible)" at the relevant point. Upon listening to the tape, the Select Committee found that the quoted language is quite audible.

On the basis of this evidence, the Select Committee concludes that the FBI's decision to meet with Senator Williams on March 23 was justified, even though the Ellis allegations on March 5 probably were false.[143] There were enough other indications of corruption to warrant further investigation. Moreover, Feinberg acted like a "bagman." He claimed to represent Senator Williams' interests, and he emphasized that those interests would have to be concealed. He implied that he acted as an insulator between Senator Williams and the actual corrupt dealings. Feinberg's protestations to the contrary, his references to "legitimacy" during a meeting in which bribes to public officials were being discussed as a regular course of dealing[144] did not and do not suggest that he and his colleagues were not corrupt. Not once during the meeting did he protest that he and his colleagues would not discuss or participate in any illicit venture. Instead, he referred to risks, including the risk that Ellis might "talk" or "sing." ([Deleted]), *reprinted in* 128 Cong. Rec. S 1505 (daily ed. Mar. 3, 1982).)

On March 13, 1979, Special Agents McCarthy, Wood, and Brady, acting in their undercover roles, met with Sandy Williams and George Katz to go to Virginia to examine the titanium mine. There were no recordings made during this trip, and no FD 302 was prepared by any of the special agents involved. Katz was introduced as a friend of Sandy Williams who had a financial interest in the mine. (*Wms.* Trial Tr. 620.) Katz was a New Jersey businessman with a decidedly shady reputation.[145] It is not clear when the FBI special agents first became aware of Katz' background, but they were certainly aware by March 23. (*See Wms.* Gov't Trial Ex. 2A, at 3–4, Sen. Comm. Print, Pt. 6, at 5–6.)

---

[143] The Ellis allegations also conceivably may have been true. As with Errichetti's and Feinberg's other statements, there is no reason for the Select Committee to believe that either man was being truthful on March 8 in protesting the accuracy of Ellis' representations. Certainly, Errichetti and Feinberg each had an interest in preventing Ellis and everyone else from replacing him as the individual with whom McCloud and Weinberg directly dealt. However, on the basis of other evidence, the Select Committee concludes that Ellis had not paid Senator Williams a bribe in connection with the Garden State Raceway. *(See* pp. 285–306 *infra.)*

[144] FEINBERG: We'll all end up in the shithouse. Now if McCloud wants somebody to get what he has to get, I'm friendly with the racing commissioner. Here's the state senator. He handles the legislation. I know all the people involved. I know the guy. I know Eric[hetti]. I don't need him and Williams is my friend. If I need anything from Pete Williams, he can't do anything. He's the one that does it. That's bullshit. He's a liar.

ERRICHETTI: Another story, O.K. The racing secretary, Charles Pascarella O.K.

FEINBERG: He's the Chairman of the racing commission.

ERRICHETTI: He owes me.

FEINBERG: That's right. He'll take care of it.

ERRICHETTI: (Inaudible)

FEINBERG: You will.

ERRICHETTI: Take care of that fuck, the days, whatever have you, I'll take care of it.

FEINBERG: I can do the thing legitimately, and he pays me a legal fee and don't worry about Pete Williams.

DEVITO: Well, I'm just, you know, that's why we're here just to straighten it out because he told him one thing and uh it's not (inaudible).

FEINBERG: That's legitimate. O.K? But he don't have to pay anybody off.

WEINBERG: We, whatever you give us, we gotta be careful because we get caught.

FEINBERG: Oh, I know. Alright. I wanna take care of Eric.

ERRICHETTI: Eric's gonna take care of . . . who has to take care of . . . is that correct?

FEINBERG: That's right.

ERRICHETTI: Fair enough.

FEINBERG: Take care of Eric and Eric's finders fee is perfectly legitimate. O.K. We'll find a hole in there somewhere for him and he'll take care of whoever else he has to take care of . . . ."

([Deleted], *reprinted in* 128 Cong. Rec. S 1504–05 (daily ed. Mar. 3, 1982).)

[145] Judge Pratt referred to Katz as a "businessman with a known criminal background." *(U.S. v. Williams*, 529 F. Supp. 1020, 1096 (E.D.N.Y. 1981).)

Errichetti met with Weinberg and DeVito (Special Agent Amoroso) on March 22, 1979, the day before the party on the yacht in Errichetti's honor. During a discussion about a matter unrelated to Senator Williams, Errichetti began to brag about his corrupt influence over the Senator:

> Ya know, I move fucking mountains. Let me tell you about Pete Williams. You know that fucking loan to fucking Sandy Williams down in fucking Piney River (inaudible). You know what? We own the cocksucker. Theres a big fucking political dinner in fucking New Jersey tomorrow and me and Pete Williams are fucking honorees. O.K.? We ain't gonna be there. We're fucking down here. He's coming the fuck down cause I'm here. So we got the guy. We got some other people down the pike to which he will bring as time goes by. ([Deleted]) [146]

On March 23, 1979, Senator Williams attended a party on the FBI's yacht *The Left Hand* in Florida, ostensibly given in honor of Mayor Errichetti by the sheik. Senator Williams had his picture taken with Sheik Yassir Habib (Special Agent Richard Farhart) and spoke with other undercover agents. He told McCloud (Special Agent McCarthy) in an unrecorded conversation that the titanium mine would be a profitable investment and that he would assist McCloud in any way possible in getting the project going. (*Wms.* Trial Tr. 623–24.) He also told McCloud that he knew George Katz' reputation had been tarnished by Katz' association with an unsavory figure named Tony Grasso. (*Id.*)

Senator Williams and Feinberg also had a recorded conversation with Weinberg about the titanium venture. Weinberg discussed the problems he had been having with Ed Ellis, but Senator Williams stated that he did not know Ed Ellis. (*Wms.* Gov't Trial Ex. 2A, at 22, Sen Comm. Print, Pt. 6, at 24.) Weinberg also discussed Sandy Williams' proposal to invest in a processing plant owned by American Cyanamid and then expressed some hesitation about the titanium mine because of George Katz' reputation. Senator Williams responded:

> SENATOR WMS: (Laugh) Ahh. Well—George.
>
> FEINBERG. Well.
>
> SENATOR WMS: He lived—I'll tell ya. I don't know George very well. I know quite a bit about George.
>
> FEINBERG. He's really a nice guy.
>
> SENATOR WMS: Uh, he is a nice guy, and he's a generous guy. And he, uh, he was doing business in a community, and he was doing business the way business is done in the community in that business. (*Id.* at 16, Sen. Comm. Print, Pt. 6, at 18.)

Weinberg then inquired about the Senator's interest:

---

[146] In the FBI transcript, "we own the cocksucker" erroneously reads "you're the cocksucker."

> Weinberg: You're not gonna be connected no way with it, right?
>
> Feinberg: Not up—not—no.
>
> Senator Wms: Well, only because they're my—so close to Alex, and, and Sandy.
>
> Weinberg: Alright, is there any way that uh, between us, that they can use, like for McCloud can use the Senator's name, uh he endorses it?
>
> Feinberg: You mean on the Piney River thing?
>
> Weinberg: Yeah. I'm not talking about endorsing Pine—you know, just that.
>
> Senator Wms: Sure.
>
> Weinberg: Use his name.
>
> Senator Wms: Sure.
>
> Weinberg: Huh?
>
> Senator Wms: Yeah.
>
> Feinberg: Yeah. You can say he has invest—he has faith——
>
> Senator Wms: Yeah. I went down there a couple of times.
>
> Feinberg: [continuing] That he has faith in.
>
> * * * * * * *
>
> Feinberg: When he says endorse, he doesn't mean put it in the newspaper, he means in talking to the people.
>
> Senator Wms: No, I——
>
> Weinberg: No, talk to people (inaudible)——
>
> Senator Wms: Yeah.
>
> Feinberg: Talking to people privately, he can say ——
>
> Senator Wms: Yeah.
>
> Feinberg: I'm—the Senator can speak for himself.
>
> Senator Wms: Yeah.
>
> Feinberg: But—he's not financially involved, cause we can't have that. You understand. *(Id.* at 18–20, Sen. Comm. Print, Pt. 6, at 20–22.)

In the recorded meeting on the yacht, Senator Williams and Feinberg explained why the Senator would have to keep a low profile: he had been "burned" earlier for his involvement in a garbage recycling business in Sussex County, New Jersey.[147] Senator Wil-

---

[147] This is the first obvious reference in the FBI files to Senator Williams' problems and involvement with Penque-Williams, Biocel of New Jersey, Biocel of Sussex County, and U.S. Titanium. The Senator's involvement with these corporations was the subject of a major dispute at his Abscam trial and on appeal in proving his predisposition.

In dispute were the Senator's propriety in having advanced the interests of these corporations, in which it was alleged he had had a concealed interest, and the government's propriety in using evidence at trial that defendants argued was neither relevant nor inculpatory. The prosecution's predisposition evidence was not developed until after the covert phase of the investigation had ended in February 1980. Much of it was based on the testimony of Sandy Williams, who had been given immunity in return for his cooperation.

As explained above, this report does not address the issue of whether the Senator was legally predisposed or whether a jury could have so found on the basis of evidence developed at trial. That is an issue to be decided by a court of law. There was a wealth of evidence present on whether the Senator's activities on behalf of the various corporations created by Sandy Williams were proper. What is of concern to the Select Committee is what the FBI knew about Senator Williams during the investigation that warranted going forward. As regards Biocel of Sussex County, by March 23, 1979, the agents knew that Senator Williams had faced considerable public criticism for activities in which, it was alleged, he had misused his office and had tried to

Continued

liams mentioned that his wife had been involved in the controversy, and Feinberg remarked that the Senator's Republican opponent in 1976 had used the allegations against Senator Williams. (*Id.* at 29-30, Sen. Comm. Print, Pt. 6, at 31-32.)

The next day Mayor Errichetti met with DeVito and Weinberg and said:

> ERRICHETTI: Pete Williams was very impressed, by the way, Senator Williams.
>
> DEVITO: Oh yeah.
>
> ERRICHETTI: Very impressed. Very, very, very impressed.
>
> DEVITO: Very good.
>
> ERRICHETTI: Good man to have on our side for a lot of reasons. I'll tell you something, and I tried to convey it to the Sheik. He can be of service to you in Washington or wherever. This is Government stuff, now.
>
> DEVITO: Yeah.
>
> ERRICHETTI: You got fucking entree. You've got a problem with what the fuck ever. Planes or what the fuck ever you wanna do. You know. We're dealing with the Senator. He's the fifth powerful fucking Senator in the United States Government. He's got the seniority. You know, 24 fucking years.
>
> WEINBERG: I'll tell you one thing. Alex does most of the talking for him.
>
> ERRICHETTI: Alex is the fucking bag man. You know, I tell you guys. Whatever . . . whatever we do, race track, whatever we do . . . Alex is involved. . . . Pete gets a fucking piece of it, whatever. And Pete's very happy.
>
> WEINBERG: He told me that. I asked him uh would he uh, you, on the mine that we could use his name.
>
> ERRICHETTI: Sure.
>
> WEINBERG: So uh he said, "Well, you know you can use it, yes, you know. . . ." (inaudible) can't have nothing in his name. Alex (inaudible). So uh he agreed to that.
>
> ERRICHETTI: Pete Williams told me, "Mayor, anything you want for these people. We're a team. You tell me, it's done." Now that's fucking Washington, D.C., now. We got Washington. We got fucking Trenton. Whatever. We got a lot of strength here now. Legitimate strength, not bullshit strength. (*Wms.* Gov't Trial Ex. 3A, at 1-2, Sen. Comm. Print, Pt. 6, at 35-36.)

On April 3, 1979, Sandy Williams met with McCloud and Weinberg regarding financing for the titanium mine. In discussing the interests then owned, Sandy Williams revealed that Senator Williams had an undisclosed one-half interest in Sandy Williams' holdings and that Feinberg was involved to protect the Senator: "He's there to keep Pete Williams' interest, get this thing organized right, so when we do make an overall deal, it'll be divided up the right way." (*Wms.* Gov't Trial Ex. 4A, at 2-3, Sen. Comm. Print. Pt.

---

conceal his interest through his wife This information added to the reasonableness of continuing the investigation. On June 10. 1979, George Katz provided Weinberg with more detailed information about the Biocel publicity. ([Deleted])

6, at 38.) Sandy Williams also requested additional funding from Abdul Enterprises for the American Cyanamid plant.[148]

As of early April 1979—before any mention of government contracts, and before Senator Williams had been offered any opportunity to commit a crime—the FBI had developed sufficient information to create a reasonable suspicion that Senator Williams and his associates had committed, were committing, or would commit a crime. First, on January 10 and March 8, Mayor Errichetti had represented that Feinberg was a bagman for Senator Williams. Second, these representations had been at least partially confirmed by Feinberg's actions. Feinberg had claimed that he represented the Senator's interests, that this had been their standard practice for at least twenty years, and that their interest in the mine would be concealed. Third, Senator Williams had done nothing to allay the government's suspicions when he had met the undercover operatives: He had defended George Katz' shady dealings on the ground that business in Katz' area was done that way; he had given permission for his own name to be used in private negotiations in connection with the titanium venture; he, and Feinberg in his presence, had implied that he would have a hidden interest in the titanium venture; and he had alluded to a previous situation in which his concealed interests had led to political difficulty. Finally, Sandy Williams had indicated that the Senator had an undisclosed one-half interest in Sandy's share of the mine and that Feinberg protected the Senator.

The Senator and others argue that there was no criminality in the Senator's actions, that it was not improper for him to have had concealed interests, and that the mine was a legitimate business deal. Even if those contentions are correct, the FBI had enough information to support a suspicion of possible illicit activity to continue its investigation. The government had been merely reactive; Senator Williams and his associates had initiated and nurtured the relationship with Abdul Enterprises. It was not until after April 1979 that the agents or Weinberg suggested criminal activity.

This is not to suggest, however, that problems and deficiencies in management, supervision, and control did not arise during the first few months of the Williams investigation. The Ellis matter is troubling. First, having expressly admitted on March 8 that he had told Ellis to lie to McCloud on March 5, Errichetti should have been viewed as a very unreliable source, willing to make defamatory and inculpatory remarks about other persons in order to promote his own interests. Nevertheless, his admission was not reported to FBI HQ or noted in any memorandum.

Second, the Select Committee has learned from Special Agent Amoroso, who was present at the March 8 meeting during which it became clear that Senator Williams was not involved with Ellis, that Amoroso did not communicate that fact to Special Agent McCarthy, who was at the March 5 meeting during which Ellis implicated Williams. Although McCarthy no longer operated undercover after April 3, 1979, he was the case agent on the Williams investigation and participated in the decisionmaking process. Because Amoroso failed to inform McCarthy of Errichetti's admission, and because McCarthy did not listen to the March 8 tape, the Ellis allegations lingered. The federal prosecutors in New Jersey, for example, were informed in April 1979 that the case against Senator Williams was strong because he had already taken a bribe on an illegitimate racetrack deal.

---

[148] Senator Williams contends in his brief before the Second Circuit that the size of the loan was the government's idea. The evidence obtained by the Select Committee clearly refutes that contention. On January 11, Feinberg and Sandy Williams spoke of a need for $12-14 million, and Sandy Williams mentioned a plan to buy the other plant by March. In April it was Sandy Williams who sought $83 million; the FBI neither suggested nor pushed the increased amount. On May 8 and 9, the parties agreed to an extra $17 million for operating expenses, bringing the total to $100 million.

Third, a memorandum dated March 26, 1979, from Strike Force Chief Thomas Puccio to his superiors in the Department of Justice states, "Feinberg has known the informant [Weinberg] for many years," and "[t]he informant believes that Feinberg would not have turned to him to seek investors in the mine if this were a legitimate business venture, since the informant, as Feinberg well knows, is a notorious confidence man." The government acknowledges that neither of the above statements is true, and both Feinberg and Weinberg deny that they knew each other prior to Abscam.

The Department of Justice has filed in the United States District Court for the Eastern District of New York an affidavit attempting to explain the erroneous memorandum. The most important point the government makes is that the memorandum was not a document on which a decision was to be based; it was intended merely to inform Washington that Senator Williams was involved in an investigation. Thus, the government contends, the errors did the Senator no harm, because no one relied on the erroneous information. The Select Committee concludes, as explained above, that even if the erroneous memorandum was ignored in its entirety, sufficient evidence existed to support a reasonable suspicion that Senator Williams was involved in the commission of a crime. Nevertheless, the Select Committee finds very disturbing the Strike Force's preparation, at a critical juncture in the Williams investigation, of a memorandum addressed to ranking Department of Justice officials that contains such a serious misstatement of material facts.[149]

2. *Undue Pressure to Commit Crimes*

Senator Williams and others have contended that undue pressure was placed on him and his associates to turn a legitimate venture into an illicit one. Irrespective of whether the government's conduct rose to the level of entrapment or of a due process violation, there can be no doubt that the government at least made several direct and indirect offers to assist Senator Williams in performing illegal acts and applied varying degrees of pressure in doing so.

On April 3, 1979, the government operatives began to take a more active role in the titanium venture. At Sandy Williams' request, Weinberg agreed to try to get for the titanium venture an $83 million loan from the sheik. Weinberg in return told Sandy Williams he wanted to obtain ten per cent participation in the mine by buying out one of the existing participants. (*Wms.* Gov't Trial Ex. 4A, at 5-7, Sen. Comm. Print, Pt. 6, at 41-43.) Weinberg also apparently began to influence decisions being made by Sandy Williams with respect to the venture:

---

[149] For a discussion of this issue, see pp. 109–10 *supra*.

> WEINBERG: O.K. Now let me ask you a question now. Do you want this as a straight loan or participation?
>
> SANDY WMS: I want you to tell me what you would like to do. (*Id.* at 5, Sen. Comm. Print, Pt. 6, at 41.)

* * * * * * *

> WEINBERG: I got the financial statements. Uh, ya gonna form a separate corporation this, right?
>
> SANDY WMS: Yeah. We haven't formed . . . let me tell you this. United States Titanium is the old company. I don't want to defunct that completely.
>
> WEINBERG: You gotta defunct that.
>
> SANDY WMS: We're gonna defunct that completely. (*Id.* at 8, Sen. Comm. Print, Pt. 6, at 43-44.)

On April 13, 1979, Weinberg, in a conversation with Feinberg, offered to let Senator Williams use the Abdul Enterprises Lear jet. Feinberg later reported that he had checked with the Senator and that the Senator had declined the offer because of new Senate rules that had recently gone into effect. ([Deleted])

On April 23 government contracts for the titanium venture were mentioned for the first time in an Abscam recorded conversation. Weinberg raised the issue. He called Sandy Williams, who was reluctant to discuss Senator Williams over the telephone until Weinberg reassured him that the telephone was "clean." (Sen. Comm. Print, Pt. 6, at 373.) Weinberg inquired:

> WEINBERG: Now what about the different permits and everything you need? Williams will definitely take care of that?
>
> SANDY WMS.: The different what?
>
> WEINBERG: If we need permits or anything else there.
>
> SANDY WMS.: Oh, yeah, we'll get all that. That'll be all . . . we'll work on that. That'll be Alex and that end. O.K.?
>
> WEINBERG: Alright, now what about, uh, let me ask you a question. There's a lot of government contracts that, you know, on the chemicals.
>
> SANDY WMS.: Right.
>
> WEINBERG: Now, can Williams get us the bids on them?
>
> SANDY WMS.: Well, I don't know about that. The main thing is with this Cyanamid thing. . . .
>
> WEINBERG: Yeah.
>
> SANDY WMS.: They've got customers they've had for twenty, thirty and forty years. (*Id.* at 375.)

The government through Weinberg was attempting in this conversation to learn what Senator Williams had agreed or was willing to do for his undisclosed interest. The inquiry also promoted the cover: If Weinberg was going to arrange a loan of $100 million, he had to know what the sheik was getting—what guarantees that the venture would succeed and that the loan would not be defaulted—in return. In additions, the reference to government contracts for chemicals was an isolated incident that took place solely between Weinberg and Sandy Williams. Government chemical contracts were never referred to again in any recorded conversation. The Select Committee therefore finds it quite unlikely that Weinberg deliberately planted the idea of government chemical contracts in a single, unelaborated mention of that idea in April so that Sandy Williams would come back in May pushing the concept of selling to the government titanium metal for submarines. (*See Wms.* Def. Appellate D.P. Brief 11 n. 10; *Wms.* Gov't Brief 26 n. 19.)

On May 8 and 9, 1979, Sandy Williams, George Katz and Mel Weinberg went to Georgia to tour the American Cyanamid Plant that Sandy had proposed buying. No conversation was recorded during the trip, and the Abscam special agents did not prepare even one FD 302 of any debriefing of Weinberg after the trip. Subsequent recordings and trial testimony suggest that the principal result of the trip was that American Cyanamid employees refused to allow the potential investors to examine the plant's books without the payment of a $50,000 fee, and that Weinberg expressed reluctance to invest in the Piney River mine part of the proposed venture because it was so much riskier than the existing American Cyanamid plant.

On May 10, 1979, Weinberg spoke separately on the telephone to Katz and to Feinberg. Katz tried to convince Weinberg that the Piney River mine was a worthwhile investment because it would yield profits of $15 million per year. [Deleted] In his conversation with Feinberg, Weinberg said that he did not want to invest in Piney River, in part because he doubted that Sandy Williams had the ability to start up and run a complex business.

The conversation between Weinberg and Feinberg on May 10 provided further evidence that Feinberg would commit crimes to advance the titanium ventures' interests. The two men first discussed persuading the Senator to use his influence to induce the Chairman of American Cyanamid to waive the $50,000 inspection fee. Then, Weinberg said:

> WEINBERG: Why don't we see if we can offer him something under the table.
>
> FEINBERG: Let's wait and see if we get the first thing over first. ([Deleted])

Feinberg also wanted to discuss with Weinberg a deal involving the Dunes Casino, but did not want to discuss it over the telephone, even though it was, according to Feinberg, "totally legitimate." ([Deleted])

On May 15, 1979, Feinberg pushed the Dunes deal. He also informed DeVito and Weinberg that he and the Senator had used their influence on behalf of the proposed Ritz-Carlton Casino in Atlantic City. He mentioned that the Senator's wife had called him and had asked him to speak to Vice-Chairman MacDonald of the Casino Control Commission to get the Commission to agree that the Ritz-Carlton need not raze its existing hotel. Feinberg said he had then talked to MacDonald and that the Ritz-Carlton's proposal had been approved, whereas a similar proposal by the Ramada Inn had been denied. After the vote in favor of the Ritz-Carlton, Senator Williams had called Feinberg to give him credit for a job well done. The Senator had mentioned that he himself had talked to the [deleted].[150] ([Deleted])[151]

Feinberg agreed to contact the Senator to find out if, in return for a $100,000 fee, he would "handle" [deleted] for the Dunes proposal. ([Deleted]) But Feinberg insisted that Senator Williams be totally isolated from everyone but himself and [deleted]. He did not want any of the other participants in the Dunes deal, or anyone involved in the titanium venture, to know of the Senator's involvement: "Oh, no, I don't even want him to know. I don't even want to mention the Senator's name." ([Deleted])

The next day, in a telephone conversation with Weinberg, Feinberg said that the Ritz proposal had been approved solely because of his and the Senator's influence. ([Deleted]) Weinberg continued to stress that the Senator's relationship with [deleted] was important to the Dunes transaction and that he himself continued to be reluctant to invest in any part of the titanium venture except the American Cyanamid plant. Later in May Weinberg arranged a meeting of Feinberg, Senator Williams, Sandy Williams, Katz, DeVito, and himself to discuss the titanium deal, as well as a separate meeting between Feinberg, DeVito, himself, and the Senator to discuss [deleted] and the Dunes. ([Deleted])

On May 24 Katz called Weinberg to try to convince him of the potential value of the titanium mine. He referred to an earlier article in the *New York Times* and then read Weinberg an article in the *Newark Star Ledger* about the value of titanium metal in submarine production.[152] Katz told Weinberg, "[I]f you go into a titanium metal which the United States is short of, ah, mind you, we could make forty thousand tons a year." (*Wms.* Gov't Trial Ex. 5A, at 4, Sen. Comm. Print, Pt. 6, at 48.)

It was apparently after George Katz' call about the submarines that the FBI decided to test whether the Senator would use his influence on the titanium deal. On May 28, in talking to George Katz, Weinberg stated that it was important for the Senator to be present at the titanium meeting because the titanium venture now involved "government stuff": that is the submarines Katz had mentioned. ([Deleted])

On May 30, 1979, Weinberg arranged with Feinberg the final plans for the upcoming meeting. He then talked to Feinberg for the first time about titanium contracts:

> WEINBERG: Alright, now you know—did you see the paper about the, they need that stuff for the submarines?
>
> FEINBERG: No, I didn't.
>
> WEINBERG: Well——

---

[150] The omission of sensitive information is identified by "[deleted]." *See* pp. V–VI supra.

[151] This May 15 meeting is the earliest evidence that the government was aware of Senator Williams' alleged influences in the Ritz-Carlton Casino matter. On October 7, 1979, both Feinberg and Harrison Williams repeated the story Feinberg had first told on May 15. (*Wms.* Gov't Trial Ex. 24A.) The government used the October 7 tape to try to show the predisposition of both defendants, and its use was hotly contested.

[152] Katz' reference to the earlier article suggests that there was an unrecorded and unmemorialized telephone call or meeting between Weinberg and Katz shortly before the conversation. Sandy Williams testified that he had notified the Senator about both articles, one of which he had magnafaxed to Washington, D.C. (*Wms.* Trial Tr. 1593–96.)

> **Feinberg**: What, titanium?
> **Weinberg**: Yeah.
> **Feinberg**: Oh, yeah, this thing's got tremendous value.
> **Weinberg**: Well, uh, can he do something on getting us the contracts?
> **Feinberg**: We can try.
> **Weinberg**: Huh?
> **Feinberg**: Try.
> **Weinberg**: O.K.
> **Feinberg**: Try. I tell you that's, that's, that's big business.
> **Weinberg**: Uh, now it's big business.
> **Feinberg**: That's right, that's right. You saw the article though.
> **Weinberg**: Oh, yeah. We been—we made quite a study on this.
> **Feinberg**: O.K. Well, now we're all excited, now, aren't we? (*Wms.* Gov't. Trial Ex. 6A, at 1-2, Sen. Comm. Print, Pt. 6, at 50-51.)

On the basis of the information it had gathered between January and May, the FBI met with Senator Williams for the second time on May 31 and offered him the opportunity to commit a crime. The tape recording of the meeting with Senator Williams is of poor audio quality. Both Amoroso and Weinberg testified at trial that Amoroso, as DeVito, had conditioned the loan to the titanium venture on the Senator's willingness to use his influence to obtain the contracts and that the Senator had said he would try. (*Wms.* Trial Tr. 817-18, 1256.) The audible portion of the tape includes the Senator saying, "I can't say yes or no; sure try" (*Wms.* Gov't Trial Ex. 7A-3, at 2, Sen. Comm. Print, Pt. 6, at 58), but it is not clear from the tape to what he was responding.[153]

Sandy Williams testified at trial that, when Feinberg had told Senator Williams that he had to agree to get government contracts in order to get the loan, Senator Williams had said, "I understand." (*Wms.* Trial Tr. 1598-99.) Also, on June 8, 1979, Feinberg and Weinberg, speaking to each other about the May 31 meeting, stated:

> **Weinberg**: Now when it comes to our friend Pete, alright.
> **Feinberg**: Yeah, yep.
> **Weinberg**: All Yassir wants to know is that he's gonna get contracts.
> **Feinberg**: Well he can't gu—he's gonna help us. He already said that.
> **Weinberg**: I know he said that.
>
> * * * * * * *
>
> **Feinberg**: He said it.
> **Weinberg**: That's—all he wants to know, so he asked Tony if he will get it. Now, either he'll come up personally

---

[153] The Senator testified that he was agreeing to see if American Cyanamid would waive its $50,000 inspection fee. (*Wms.* Trial Tr. 4282.)

and talk to him, or he'll let him tell Tony that he'll help get the contracts.

Feinberg: He said he would help us.

Weinberg: Alright, that's the main thing.

Feinberg: You heard him say it didn't you?

* * * * * * *

Weinberg: Yeah, I heard him say it.

Feinberg: O.K. (*Wms.* Gov't Trial Ex. 9A, at 3–4, Sen. Comm. Print, Pt. 6, at 63–64.)

Agreeing to help get the government contracts was the principal component of the Senator's proposed criminality. Proof that he intended to conceal his interest would further evince his criminal intent. Senator Williams contends, however, that it was not his idea to keep his interests secret. He alleges that pressure by the government led him and his associates to agree to conceal his interest.

As already shown, the idea of keeping the Senator's interest secret was not first raised by the government, but by Feinberg; it was next discussed by Feinberg in the Senator's presence on March 23; and Sandy Williams had indicated that he held some of the Senator's interest. But it is also true that Weinberg stressed more than once to the Senator, to Alex Feinberg, to Mayor Errichetti, and to George Katz that the Senator could not get government contracts unless his interest was concealed.

During one of the private meetings prior to the luncheon meeting at the Hotel Pierre in New York on May 31, 1979, Feinberg said: "He can't, Christ, he'll ruin himself (inaudible). He has to file a disclosure. If he files a false disclosure, he's guilty of perjury, and he won't do it." (Sen. Comm. Print, Pt. 6, at 389.) Yet in two other pre-luncheon meetings, one with Weinberg and one with both Weinberg and DeVito, Feinberg said the Senator would use his influence on behalf of the titanium venture, and he quickly agreed that the Senator's interests would have to be concealed.

Weinberg: What difference does it make if the Senator (inaudible) get them contracts.

Feinberg: Well, because he can't tell what he'll do. He'll help us; I can tell you that.

Weinberg: Yeah.

Feinberg: I can tell you that already. You mean on the mining and things?

Weinberg: Yeah.

Feinberg: Oh, he'll do that.

Weinberg: Huh.

Feinberg: He'll do that.

Weinberg: That's the number one thing.

Feinberg: Can I tell you something?

Weinberg: What?

Feinberg: That is the number one thing. He will help us with that. No question about that.

* * * * * * *

Weinberg: And then, you know, he's gonna be our partner in this. . . .

FEINBERG: Huh.

WEINBERG: He's gonna be our partner in this here. . . .

FEINBERG: Mining thing.

WEINBERG: Mining thing, you know. Let him put the, tell you that he's gonna get us those contracts, he could do it. If he can't. . . .

FEINBERG: Now, that's something else. On the contracts, I can tell you now that he will open up the doors for us. And use this, you know what I'm talking about, to get the contracts. (*Wms.* Gov't Trial Ex. 7A-1, at 1-2, Sen. Comm. Print, Pt. 6, at 52-53.)

* * * * * * *

FEINBERG: Okay, and then we also can talk all together about the mining thing.

WEINBERG: Yeah, now the mining thing, he's got to come up, he could open the doors.

DEVITO: As far as the mining thing is concerned, is he going to be able to, in other words, I gather now from this recent disclosure about the use of the titanium.

FEINBERG: Titanium.

DEVITO: Is he going to be able to steer any kind of contracts from the committees that he's on toward, toward the operation that we're going to get involved with? I mean. . . .

FEINBERG: Well this I didn't know until now. I have to ask him that.

DEVITO: Yeah.

FEINBERG: I would assume, I know that he's often opened up many doors. You understand what I'm talking about. And with his blessing. . . .

WEINBERG: But he's gotta, he's getting a piece of the thing. Right?

FEINBERG: I understand it's a different situ. . . .

WEINBERG: It's a different situation. He's on a. . . .

FEINBERG: Right, right.

DEVITO: So he's going to get his 20 percent through Sandy.

FEINBERG: I know that.

DEVITO: Sandy is going to handle that.

WEINBERG: That's in the mine though. But on the other thing there he, in fact you say he may put the 20 percent in his name even. I don't think he can though.

DEVITO: Well, if he puts. . . .

FEINBERG: I don't know. We haven't decided yet. We're gonna examine the law involving his side investments which he. . . .

WEINBERG: I don't think he can.

FEINBERG: He can put it in his wife's name or someone else's.

WEINBERG: They could chase that too fast.

DEVITO: Yeah.

WEINBERG: Come on. You're an attorney. You know that.

FEINBERG: I know that.

DeVito: Any, anything he puts. . . .

Feinberg: I'm not sure that he's forbidden (inaudible).

Weinberg: Sure he is, if he's going to get us open doors. Come on. You know that's a conflict of interest. He'll be sitting with Nixon out in Clemente there.

Feinberg: (laughs)

Weinberg: You know, let's do it smartly.

Feinberg: There's one guy we don't want to sit with.

Weinberg: No. But you know, Alex, you got to do it smart. You know. You got to get that set up. Also, we've gotta get a look at those books.

Feinberg: Alright, we'll work that out.

* * * * * * *

Feinberg: Now on the mining thing, uh, we got to talk about him. What's our chances of getting business for the government's titanium you are talking about.

Weinberg: We got to put it on the table.

DeVito: Well, it's got to be ironed out. It's gotta be ironed out as to what his position is going to be. If he's going to be of any value, okay, in this thing, he can't be shown on any of the papers, because then he can't do anything, okay.

Feinberg: No, I agree with you. No, I agree with you. He can't be. . . .

DeVito: You know. . . .

* * * * * * *

Feinberg: And that we can work out. (*Wms.* Gov't Trial Ex. 7A-2, at 1-3, Sen. Comm. Print, Pt. 6, at 54-56.)

During the luncheon meeting, Senator Williams himself raised the disclosure issue, and Feinberg quickly said he would work it out:

Feinberg: I've got to do some manipulation here on account of our——

Sandy Wms: Alex'll——

Feinberg [continuing]: Situation. (inaudible) a lot of——

Senator Wms: I've got a—my situation is this. I've got to uh I'm under a law that makes me disclose an interest when I have an interest. But up until now there's been no defined interest. In what? An idea, basically. Because there's no corporate stock.

Feinberg: But when and if you do——

Senator Wms: When that happens, then that's part of my law (inaudible).

Feinberg: Well, that's what you and I have to discuss, what we have to examine. We're going to do that.

Senator Wms: But there's no sense doing anything before if there was no reason for me to do it on this by May 15th——

Feinberg: No, no. No, no.

Senator Wms [continuing]: Because it's just for——

Feinberg: We'll work that out. There will be nobody with more then.

> **Sandy Wms**: That's right.
>
> **Weinberg**: You can put any name down.
>
> **Feinberg**: I know that. I understand that. Don't worry. I'll take care of that. That I'll take care of. I'm not trying to brush off everything. Just assuring you (inaudible). (*Wms.* Gov't Trial Ex. 7A-3, at 1-2, Sen. Comm. Print, Pt. 6, at 57-58.)

Immediately after the May 31 meeting, Weinberg began a campaign to keep the Senator's interest concealed. In a conversation with Feinberg later that day, Weinberg stated:

> **Weinberg**: You got to give me a name to put the Senator's shares in.
>
> **Feinberg**: I'll take care of that.
>
> **Weinberg**: Yeah, but you gotta get it to me, what name we're gonna put it in, because I gotta put it in, in front of the board.
>
> **Feinberg**: I understand that. Before you go back, ah, I'll have it all worked out.
>
> **Weinberg**: Alright, so you gotta figure a name, cause he . . . he can't put it in his name. Forget it.
>
> **Feinberg**: I know that; I know that. (*Wms.* Gov't Trial Ex. 8A, at 8-9, Sen. Comm. Print, Pt. 6, at 59-60.)

On June 8 Feinberg told Weinberg, "And I'm gonna put, uh, our friend's share in another guy's name. You don't care what the name is." ([Deleted]) Weinberg replied, "No." That same day Weinberg told Errichetti he wasn't sure that Feinberg understood how important it was that the Senator's interest be concealed:

> **Weinberg**: Now . . . he cannot put Williams, the Senator, in his name.
>
> **Errichetti**: That's his problem.
>
> **Weinberg**: Well but . . . we'll be in trouble.
>
> **Errichetti**: That's Feinberg's problem not ours.
>
> **Weinberg**: Yeah, but you know, if he's stupid enough . . . I told him four times . . . sometimes I don't think he listens . . . Williams is only getting 20 percent for one reason: he's going to get the contracts.
>
> **Errichetti**: Well, we'll see.
>
> **Weinberg**: You follow me?
>
> **Errichetti**: Yep. ([Deleted])

On June 10 Weinberg told Katz what he had earlier told Errichetti: that the Senator could not have his shares in his own name and that Weinberg was unsure that Feinberg understood how important it was:

> **Weinberg**: So I told him to put, so I spoke to the Mayor. He said, "Put 'em in my name; I don't give a shit." So I told Alex to put 'em in his name. That was number one. Then I, we, spoke about Pete Williams. Fucking Alex; I don't know if he's thick or what.
>
> **Katz**: Who?
>
> **Weinberg**: Feinberg.
>
> **Katz**: Whether he's thick.

Weinberg: Yeah, sometimes I wonder how if he's thick, just doesn't listen, or he's so excited.

Katz: Yeah.

Weinberg: He cannot put those shares in Pete Williams' name.

Katz: Uh huh!

Weinberg: Now, you know that, and I know that.

Katz: I wondered about that. But listen, I said to myself .... look, I wondered about it, Mel, but I said to myself, "Alex is a lawyer for a long time, and Pete has been a Senator for a long time." I said, "What the hell am I going to do, fight them, or you know."

Weinberg: Well, you gotta fight it. Well, that's an act they put on in front of us. That's all it is.

Katz: Yeah.

Weinberg: You know, to show that he's honest, now I said to Alex, I got so pissed off, I say, "Alex, you're an attorney. You can't put that in Pete Williams' name." I said, "What the fuck do you think he's getting twenty per cent for. He's gotta do work for that twenty per cent." I said, "Let's not pull any games." He said, "You're right." So he's got a name he's gonna put it in.

Katz: Oh he has.

Weinberg: Yeah.

Katz: Fine.

Weinberg: Pete Williams said at the table he can't put it in his name even.

Katz: I thought that Pete had gone along on the premise that he couldn't put it in his name all the time.

Weinberg: He did.

Katz: And putting it in his wife's name is no good either.

Weinberg: No. ([Deleted])

The foregoing excerpts show that, beginning on May 31, 1979, Weinberg continually prodded the participants in the titanium joint venture to ensure that Senator Williams would conceal his financial interest in the venture. Because all of the participants in the venture knew that Weinberg was the key to the $100 million loan they needed in order to proceed, Weinberg's prodding must have been perceived by them as pressure, irrespective of Weinberg's actual intent. Because of the huge sums at stake, that pressure seems quite likely to have been felt to be intense.

Nevertheless, the Select Committee knows of no guideline or FBI policy that was violated by Weinberg's conduct. Nor would any of the subsequently promulgated guidelines be violated by the same conduct. Nor has the Select Committee succeeded in devising any proposed statute or guidelines that would prevent such conduct without unduly restricting necessary and desirable law enforcement activities. The Select Committee does note, however, that Weinberg's application of pressure constitutes just one of several aspects of Abscam that demonstrate the importance of replacing informants with undercover special agents at the earliest practicable moment in an undercover operation; if such pressure is to be applied, it should be applied by an undercover agent fully familiar with the boundaries established by the entrapment doctrine and by the due process clause.

This issue of disclosure of the Senator's interest arose again many months later. Once again the Senator raised the possibility, but quickly backed off when the government agents reminded him of the consequences. On September 11, 1979, the titanium investors had a meeting and decided to sell the mine property and the American Cyanamid plant to a purported second group of Arab investors, who supposedly had contacted Weinberg and DeVito, for a $70 million profit. Weinberg and DeVito made it clear that there would be a sale only if the Senator continued to agree to use his influence on behalf of the new buyers. The Senator agreed:

> **SENATOR WMS**: If now, put it this way to them, that this group to give them, whatever they feel there's some assurance this entity will continue with 'em.
>
> **FEINBERG**: That's right. That's what you're doing.
>
> **SENATOR WMS**: Right.
>
> **FEINBERG**: That's exactly what ya told them.
>
> **WEINBERG**: Right.
>
> **SENATOR WMS**: And be helpful to them.
>
> **WEINBERG**: Right.
>
> **FEINBERG**: That's right.
>
> **SENATOR WMS**: We got this all together on certain premises and they will, they will continue. (*Wms.* Gov't Trial Ex. 23A, at 54, Sen. Comm. Print, Pt. 6, at 261.)

As Feinberg put it, and as the Senator agreed, they would "continue the same entity of effort." (*Id.* at 55, Sen. Comm. Print, Pt. 6, at 262.) In discussing what to do with this huge sum of money, however, Senator Williams expressed an interest in taking his money openly and paying taxes on it. (*Id.* at 64, Sen. Comm. Print, Pt. 6, at 271.)

Feinberg, Weinberg, DeVito, and Senator Williams next met on October 7. DeVito asked the Senator and Feinberg whether they really meant to disclose the Senator's profits. The Senator and Feinberg quickly agreed that some way would have to be found that would protect Senator Williams now, but would enable him to use the money later to "accelerate his retirement."

> **WEINBERG**: Alright. You know the whole deal was sold to the other Arabs [on the basis] that you were going to be out front for them. You know, the same way you were going to do for Yassir. Alright. That's why the deal was made with them. And then Katz said that you wanted to declare. Sandy was speaking—Sandy spoke to you about you was going to declare 17 million dollars profit or something.
>
> **SENATOR WMS**: No, we hadn't figured that out. At some point I'm going to have to find a way to protect myself, with some kind of a, call it a declaration or whatever you want to call it. I'm going to have to go public with something or other. We haven't figured that out.

* * * * * * *

DeVito: So when we had that meeting at the, at the other hotel and you mentioned that, that you were going to declare the money that came out of the sale, you know, George got upset, you know, and said to us, "Well, you know, how can that be?" And in reality he's right. Because, if, if that was the way you were going to handle it, then the sale probably wouldn't go through. And the sale was based on the fact that you were going to be with the second group.

Senator Wms: Everybody is, everybody is protected in a quiet [way]—in other words, not out front.

Feinberg: Yes, sub rosa. Sub rosa.

* * * * * * *

DeVito: And Alex can declare. And the mayor can declare. Everybody can declare. You can't.

Weinberg: And we, we can't.

DeVito; And we can't. Now, they are not going to to buy it on the premise that you're going to declare. There's another problem. If you were to declare we'll have to go back and reform the corporation.

Weinberg: Change all the records.

DeVito; All the records have to be changed, because then in order for you to get the money, you'd have to be shown as holding the percentage that Alex is holding for you now. In other words——

Senator Wms: Um hum.

DeVito [continuing]: That whole thing would have to be redone, right?

Weinberg: Well, this is where the lawyer comes in, Alex.

Feinberg: I, I have——

Senator Wms: We can blind trust me you know.

Feinberg: I, I can blind it. I, I've got an expert. I've got the guy who I told, I told you once before.

DeVito: Right.

* * * * * * *

Weinberg: Well it may, be under—it came back to us.

Feinberg: Well, you know something. Here's the trouble. I love George. He's a nice guy. And Pete did make a statement about maybe I have to declare some, at that time very casually.

Senator Wms: Yeah.

Feinberg: And, immediately George, I'm sure sees that as a, "Jesus Christ, this is like a time bomb or a hand grenade," O.K.?

DeVito: Well, what it is, it would have killed the sale. It's what it would have done.

Feinberg: Forget it. We're not gonna, we don't want to kill this sale. We're not going to hurt him. Cut my throat first and I'll find a way.

* * * * * * *

SENATOR WMS: What are they, what, what do they know and what can they know to keep the deal about all the arrangements? What can they know?

WEINBERG: Well, all they know is that you will help to get the government contracts. Do what you can for them.

FEINBERG: You know the usual.

WEINBERG: The usual thing. That's——

FEINBERG: To open the doors, open the doors.

DEVITO: In other words, your position is going to be with them the same as it was with the——

FEINBERG: With Yassir.

DEVITO [continuing]: Original group. In other words, what, the way you were going to operate for the original group.

FEINBERG: Is the way you'll operate.

DEVITO: You know the everybody here. Now, that's the way they, that's what they were buying it for, is that you were going to operate on the same——

SENATOR WMS: Uh hum.

DEVITO [continuing]: Principle there, so that when the sale goes through, and whatever, whatever the proceeds that are coming to you would be going to Alex.

SENATOR WMS: Right.

* * * * * * *

DEVITO: And put that in there.

FEINBERG: I'll do it. (inaudible)

* * * * * * *

WEINBERG: And then, when you retire——

FEINBERG: Then you can say I've got it (inaudible) (laughter).

WEINBERG: Accelerate the retirement. (Several laugh.)

FEINBERG: Damn right.

* * * * * * *

DEVITO: George got, you know upset. He says, "How can, you know, if they're buying the, the operation the way it was, how can the Senator declare?" He says, "We're going to, it'll be known."

FEINBERG: Actually, I'll tell you——

DEVITO: I think, I think what he did in that meeting. I kind of understood, or my understanding of it was, was that the way we had talked about it, you were gonna declare it, but in some other way. In other words, not that you were going to say, "O.K., I've got 17 million."

SENATOR WMS: That's exactly——

FEINBERG: No——

SENATOR WMS: He hit just right.

FEINBERG: You hit it right.

SENATOR WMS: Yeah.

FEINBERG: And he misinterpreted——

SENATOR WMS: There are ways and ways to——

DEVITO: In other words to——

FEINBERG: Forty-eight million——

Senator Wms [continuing]: On a, on a certain record. Now, if its a blind trust, that's the way for my purposes. I, I will find a way to——

Feinberg: That's right—to do——

Senator Wms [continuing]: Make that kind, and nobody knows nothing.

DeVito: No, I see, or, I, what I think George understood at that time was that all of a sudden you were going to announce to the world——

Feinberg. No.

DeVito: That you——

Senator Wms: Holy cow.

DeVito [continuing]: Got 15 million dollars.

Feinberg: No, no, no.

Senator Wms: Oh Christ no. George——

Feinberg: Even I knew that.

Weinberg: Well, George didn't understand it, you know.

Senator Wms: No, Christ no. (*Wms.* Gov't Trial Ex. 24A, at 40–50, Sen. Comm. Print, Pt. 6, at 328–38.)

3. Coaching

The most troubling aspect of the investigation of Senator Williams is the so-called "coaching incident" of June 28, 1979, particularly because of the importance to the prosecution of the videotaped meeting between Senator Williams and the sheik after the coaching session. Before that date the government had some information suggesting that Senator Williams would commit a criminal act. Moreover, he had agreed to try to use his influence to obtain government contracts for titanium metal for submarines. Apparently to strengthen its case, the government began to press for more evidence. One form of pressure was, as described above, Weinberg's efforts to persuade the other participants of the importance of concealing the Senator's interest in the titanium venture. The other principal form of pressure was Weinberg's attempt to extract from the Senator a strong affirmative statement of what he was going to do to advance the venture's interests.

The need for stronger evidence arose in part from Senator Williams' reticence and proclivity for remaining in the background during meetings attended by Feinberg, Sandy Williams, and Katz. The Senator's business associates recognized the effect of those characteristics and tried to explain to Weinberg that, although the Senator was quiet, he could be depended upon to assist the venture. When that occurred, Weinberg used the opportunity to emphasize the importance of the Senator's willingness to use his influence corruptly. One example of this is a conversation between Weinberg and Katz on June 10, 1979:

Weinberg: He don't say too much at a meeting, does he?

Katz: Pete?

Weinberg: Yeah.

Katz: No, he more or less keeps quiet. He doesn't have too much to say. You know, he's not a pusher like the Mayor.

Weinberg: No.

Katz: He's not a guy. He's not a doer, you know. Quietly behind the scenes, you know, he may move a little bit. Alex has got a lot of confidence in him, and Sandy's got lots and lots of confidence; but let me tell you this here, between you and me: He's in a very, very powerful position here, the committees that he heads. You understand?

Weinberg: Yeah.

Katz: But he doesn't use that power for any advantages.

Weinberg: Oh? How can we make him use it?

Katz: Uh, how you gonna change a man that, you know, his ambition doesn't run great? He could, he should, be one of the country's foremost leaders, to be the chairman of the, of the, of the Health, Welfare, Education, which takes in all the labor, to be the chairman of all the unions. To be a sub-chairman for all the banking committee. He's got one of the most powerful committees down there. Three-quarters of the legislation that's passed in the, in the United States Senate, three-quarters of the legislation goes through his committees.

Weinberg: No kiddin!

Katz: That's how powerful he is. I want you to know, Mel, he doesn't use that power. Between me and you, he's not the kind of a guy like Long or Kennedy. They've got the power, and they use it.

Weinberg: Well, he said he would get us the contracts, you know.

Katz: Yeah.

Weinberg: He said he'll do something on the contracts from the government for us.

Katz: Oh, there's no question. If he's got an interest, he'll do something like that, naturally.

Weinberg: Well, that's what I mean. We can depend on him. Why give him twenty per cent, if he ain't gonna do nothin?

Katz: Oh, he's gotta do something. ([Deleted])

On June 14, 1979, Weinberg attempted to induce Feinberg to put in writing for the sheik that Senator Williams would obtain government contracts. Weinberg asked Feinberg to write up "resumes" for all of the participants in the venture, outlining what each would do for his share. (*Wms.* Gov't Trial Ex. 9A, at 7, Sen. Comm. Print, Pt. 6, at 67.) Weinberg urged Feinberg to be very explicit and promised that the documents would be destroyed.

When Feinberg presented his resumes in a meeting on June 15 with Weinberg, DeVito (Special Agent Amoroso), Katz, Sandy Williams, and Errichetti, Weinberg complained that Feinberg's written explanation of what Senator Williams would do for his share of the loan "don't tell him [the sheik] a damn thing." (*Wms.* Gov't Trial Ex. 10A, at 3, Sen. Comm. Print, Pt. 6, at 72.) Even after being reassured that the paper would be destroyed, Feinberg refused to put in writing that Senator Williams would guarantee contracts. (*Id.* at 4, Sen. Comm. Print, Pt. 6, at 73.)[154]

DeVito then suggested that the Senator and the sheik meet face-to-face. Everyone at the meeting, particularly Errichetti, Weinberg, and DeVito stressed that the Senator would have to "come on strong." Feinberg agreed to tell the Senator what he had to do. On June 19 Feinberg reported to Weinberg the results of a meeting of Feinberg, Errichetti, and Senator Williams.

> FEINBERG: No problem whatso . . . . He understands the whole goddamn shmear.
>
> WEINBERG: And he knows he's got to come on strong?
>
> FEINBERG: Yeah, that's right. Eric made it very clear. So did I. Eric, particularly, and it worked out fine. (*Wms.* Gov't Trial Ex. 11A, at 1, Sen. Comm. Print, Pt. 6, at 78.)

On June 27 Errichetti explained to Weinberg, Feinberg and Katz what he had said to Senator Williams to convince him to come on strong:

> ERRICHETTI: In other words, with Pete Williams, ok. When I went there, he didn't say two fucking words. I got Pete by the fucking throat, I tell you as close as I came in his office. "Let me tell you something, cocksucker don't you go fucking this thing, up. I got a chance to make a fucking million dollars, you prick. All you're gonna do is give a speech like you never gave in your life. Not much left to say. You're gonna fucking guarantee that fucking contract." He said, "No way."
>
> KATZ: He said what?
>
> ERRICHETTI: He said, "No way." I said, "You're gonna fucking say it. You don't give a fuck. Never mind about doing it. You're gonna fucking say it. *Wms.* Gov't Trial Ex. 13A-1, Sen. Comm. Print, Pt. 6, supplemental page.)[155]

The entire meeting on June 27 is full of references to the plan for a "command performance," for the "most important speech of his life," and for "bullshit speech." Weinberg said, "Don't let him talk about the mine. Don't mention the mine." (*Wms.* Gov't Trial Ex. 13A, at 8, Sen. Comm. Print, Pt. 6, at 90.) Weinberg also suggested giving Senator Williams "marijuana to pep him up," because the Senator no longer drank. (*Id.*)

---

[154] The need for some proof in writing of what Senator Williams was willing to do in return for his share of the money resurfaced after the decision to sell the mine and the plant to the second group of Arabs. Weinberg told Errichetti that the new investors might want a letter from the Senator saying he would continue his efforts on behalf of the new group. Errichetti said he would sign the letter for Williams or somehow replace the body of another letter with the Senator's signature already on it. When Weinberg expressed some doubt that this could be done, Errichetti replied, "I got ten thousand fucking letters from him . . . . I'll experiment." (*Wms.* Def. Trial Ex. WQ, Sen. Comm. Print, Pt. 6, at 433.) Weinberg suggested that Errichetti ask Senator Williams to write the letter on the condition that Errichetti promise to hand deliver and then burn it. (*Id.*) Errichetti wanted to try his way first.

Weinberg, Errichetti, and Errichetti's secretary, Dani Anise, met on September 13 and worked out the mechanics of the forgery and the language of the letter. (Sen. Comm. Print, Pt. 6, at 438-39.) On the next day, Errichetti delivered the forged letter to DeVito (Special Agent Amoroso) and Weinberg. DeVito told Errichetti he had missed his calling in life, and asked Weinberg to remind him never to leave his signature with Errichetti. (*Wms.* Gov't Trial Ex. WD, Sen. Comm. Print, Pt. 6, at 440-41.)

As late as September of 1979, then, the FBI was continuing to seek written evidence that Senator Williams was going to use his influence improperly. While the Select Committee is concerned about the repeated efforts to get Williams to commit himself, it is not troubled by the actual forging of the letter. The idea for the forgery was Errichetti's; Amoroso and Weinberg acceded to his demands to preserve their cover. The government never used and never planned to use the forged letter against Senator Williams.

[155] Errichetti also made several references to having told the Senator he would stick him with a pin or hit him with a bat.

On June 28, minutes before Senator Williams met the sheik, Weinberg and Errichetti briefed the Senator on what to say to the sheik. Weinberg told him to "forget the mine," to "stress how important you are," and to say, "Without me there is no deal. I'm the man. I'm the man who's gonna open the doors." (*Wms.* Gov't Trial Ex. 14A, at 2-4, Sen. Comm. Print, Pt. 6, at 94-96.)

Weinberg also told him to tell the sheik that his shares would be in Feinberg's name, that Feinberg would endorse them to him in blank, and that the Senator would put his name on once he left the Senate. (*Id.* at 5, Sen. Comm. Print, Pt. 6, at 97.) Weinberg urged the Senator to view the impending speech as "all bullshit" and "all talk." (*Id.*)

Thus, there are two important elements to the June 28 coaching session: (1) the importuning to "come on strong"; and (2) the assurance that the words to be used were mere talk and "bullshit." Up to a point, the first element is positive; it attempts to ensure that the public official's corrupt intent is clear and unambiguous. The need for such clarity is especially important when the government creates a situation in which it seeks to induce a public official to take a bribe, because the principal element of the crime of bribery is not an act, but mere words: the promise to perform an official act in return for something else of value. The crucial evidence, therefore, consists of the words actually used and the circumstances evincing the speaker's intent with respect to those words. If the words are sufficiently strong and clear, they will themselves evince the corrupt intent with which they were uttered. Accordingly, only if the government's methods in inducing the speaker to use strong language are otherwise improper—for example, if the government employs coercion or subjects the speaker to duress—is the attempt to evoke such language improper.

It is, therefore, the second element of the June 28 coaching session that the Select Committee finds objectionable. If, by characterizing the Senator's impending statements as mere talk and "bullshit," Weinberg meant to have the Senator believe that he would never have to use his influence and that he was being asked to lie to the sheik, the coaching session would be reprehensible, because it would constitute an attempt by Weinberg to create a false belief never intended by the government to be the basis for prosecuting Senator Williams. Specifically, if Weinberg meant to convince the Senator to lie to the sheik about his willingness to use his senatorial office corruptly, Weinberg was attempting to induce the Senator to engage in conduct other than the classic form of bribery that the FBI was seeking to establish. A lie of that nature would still evince a willingness to commit fraud, but fraud was not the FBI's goal; and, because the sheik was in fact an FBI special agent who, being knowledgeable about the circumstances, could not reply on any such false statement by Senator Williams, the government probably could not successfully have prosecuted the Senator for fraud. Also, although the Second Circuit Court of Appeals in the *Myers* case ultimately concluded that even a fradulent promise to perform an official act in return for consideration constitutes bribery, (*United States* v. *Myers*, 692 F.2d 823, 840-42 (2d Cir. 1982)), there had been no such decision as of June 28, 1979; there is no evidence that any of the Abscam investigators or prosecutors had even considered that issue, much less decided to seek a prosecution on that basis; and, in any event, no one had authorized Weinberg to alter so fundamentally the basic scenario of the Williams investigation.

Weinberg may have meant, however, that, because the Senator already had promised to use his influence, because that message already had been conveyed to the sheik by Weinberg and DeVito, and because the loan was essentially assured, the conversation with the sheik was a mere formality, a mere iteration of words that in substance had already been uttered. In that sense Senator Williams was to give a performance—a reenactment of a prior event. Under this interpretation the Senator also would be performing, in that he would be altering his customary style and would be forceful and boastful.

If this was the message Weinberg meant to convey, his actions were nonetheless objectionable. His language was unnecessarily and unduly ambiguous for such a purpose; and he had not been authorized to downgrade the importance of the meeting.

Moreover, whatever Weinberg's intent may have been, the FBI, by allowing the incident to occur, clearly and unjustifiably failed to exercise adequate supervision and control of Weinberg and of the investigation. The FBI's failure to reduce Weinberg's role throughout the investigation was, as noted earlier, an undesirable investigative practice that raised several problems. To instruct Weinberg to meet with the suspect, without being accompanied by any undercover special agent, only moments before a crucial meeting at which an expression of the suspect's true intentions was to be sought, was not merely undesirable; it was egregious.[156]

The evidence suggests that Weinberg and Errichetti did not induce Senator Williams to lie about his intentions to the sheik. Before the June 28 coaching session, Feinberg and Sandy Williams had said to Weinberg:

> FEINBERG: I talked to the Senator before in New York. I said, "These people and everybody understands that you have to help us get these contracts." He said, "Of course I will." Isn't that right?
>
> SANDY WMS: Definitely. I was right there. (*Wms.* Gov't Trial Ex. 10A, at 3, Sen. Comm. Print, Pt. 6, at 72.)

During the coaching meeting with Weinberg and Errichetti, Senator Williams said, "Well that's why it comes down to metal is the big thing. That's the government's area." (*Wms.* Gov't Trial Ex. 14A, at 3, Sen. Comm. Print, Pt. 6, at 95.) After the Senator met the purported sheik, Feinberg reported to Weinberg:

> You know, the Senator seemed to get a big kick out of his own performance, because when he related to me what he said—and he keeps saying after each statement, "And

---

[156] Supervisor John Good testified that he had instructed Weinberg to meet with Senator Williams "to brief him as to what we expected to hear from him when he addressed the sheik." (*Myers* D.P. Tr. 2809-10.)

> it's all true," he says (laugh)—he was very excited, like a kid. He was pleased with himself. (*Wms.* Gov't Trial Ex. 16A, at 3, Sen. Comm. Print, Pt. 6, at 133.)

The subsequent history of the titanium deal also suggests that Weinberg's and Errichetti's coaching on June 28 did not induce Senator Williams to make false promises for the sheik's ears. On August 5, 1979, the Senator accepted his blank stock certificates and expressed pleasure at the way his interest had been concealed; the sheik was not present. (*Wms.* Gov't Trial Ex. 21A, at 4–5, Sen. Comm. Print, Pt. 6, at 186–87.) On September 11 DeVito clearly stated that the resale was possible only if the Senator would continue to use his influence on behalf of the new purchasers, and the Senator agreed to do so; the sheik was not present. (*Wms.* Gov't Trial Ex. 23A, at 54–55, Sen. Comm. Print, Pt. 6, at 261–62.)

The Select Committee therefore concludes that the prosecution of Senator Williams did not, as former Assistant United States Attorney Edward J. Plaza has contended, constitute the prosecution of actors for speaking their lines in a play.[157] Similarly, the Select Committee finds that the events of June 28, 1979, were not, as Plaza has claimed, a perversion of the truth. Every undercover operation is by definition replete with dissimulation; but dissimulation in such a context is not synonymous with perversion of the truth.

The Select Committee does find that the events of June 28, 1979, represent shoddy investigative work and provide a glaring example of the FBI's failure to control and supervise Weinberg. That failure led to possible entrapment. It led to possible due process violations. Instead of obtaining what might have been its strongest inculpatory evidence, the government brought upon itself a major problem that has subjected the entire Abscam investigation to deserved deprecation.

Federal prosecutors from the Strike Force for the Eastern District of New York and from the New Jersey United States Attorney's office reprimanded Weinberg for his June 28 coaching efforts. Judge Pratt found in his *Myers* decision that the coaching incident was atypical of Abscam and that coaching never again occurred. (*United States* v. *Myers,* 527 F. Supp. 1206, 1234–35 (E.D.N.Y. 1981).) The Select Committee finds that, while Weinberg never again directly told a target what to say, he did communicate to middlemen that various Congressmen would have to come on strong.[158]

Both Judge Pratt and the Senate Ethics Committee found that the coaching incident did not overbear Senator Williams' will. His own testimony confirms that he said what he wanted to say during his meeting with the sheik on June 28.[159] The Select Committee finds no contrary evidence.

---

[157] The Select Committee also emphasizes that, even if Senator Williams' promised to use his senatorial office to assist the venture was false because he never intended to fulfill that promise if called upon to do so, the making of such a promise was fraudulent. Moreover, in *U.S.* v. *Myers,* 692 F.2d 823 840–42 (2d Cir. 1982), the court held that such conduct constitutes the felonious solicitation of a bribe within the meaning of 18 U.S.C. § 201(c) (1976). (*See* p. 175 *supra.*)

[158] *See* pp. 188–89 *supra.*

[159] *Wms.* Trial Tr. 4284–86. Judge Pratt said of the coaching incident: "When he testified at his own trial, however, Williams stated that he paid no attention to what Weinberg had told him, and that when he appeared before the sheik he knew what he was going to say and he said it." (*U.S.* v. *Myers,* 527 F. Supp. 1206, 1234 (E.D.N.Y. 1981).)

4. Size of the Inducement

Senator Williams alleges that the inducements offered to him were unrealistically large and contrary to the FBI's own internal rule that inducements to commit a crime be proportionate to what the target would ordinarily encounter in the "real world." [160] (*Wms.* Def. Appellate D.P. Brief 47–48; *see Myers* D.P. Ex. 110 (testimony of FBI Director William H. Webster).) Williams argued in his brief before the Second Circuit that the government had had no evidence that he had traveled in a world in which tens of millions of dollars were offered as loans. He claimed that his expected return from the sale of the venture to the second group of Arabs was more than he would otherwise have made in his entire life. (*Wms.* Def. Appellate D.P. Brief 48.)

The inducements offered to Senator Williams were unquestionably huge. First, he was promised a loan, unsecured by any of his personal assets, of which his share would be $18 million.[161] Second, he was told that he would receive $12.6 million in profit from the sale of the titanium mine and the processing plant in Georgia.[162] (*Wms.* Gov't Trial Ex. 23A, at 25, Sen. Comm. Print, Pt. 6, at 232.) Third, through Sandy Williams, he was offered a bribe of $20,000 for expense money. Fourth, on January 15, 1980, he was offered an unspecified sum of cash in return for helping the sheik get political asylum.[163]

Judge Pratt rejected Senator Williams' contention that the inducements were excessive. He held that the loan, which would have had to be repaid, would have been excessive only if the financial potential of the titanium venture did not warrant such a large sum. He decided that the increasing value of titanium, the proven ore deposits at Piney River, and the production potential of the American Cyanamid plant justified the amount of the loan. (*United States* v. *Williams,* 529 F. Supp. at 1101–02.)

The Select Committee agrees with Judge Pratt's conclusions about the size of the loan, principally because it was the Senator's associates who set its amount. Before he even knew of Abdul Enterprises, the Senator was seeking sources of money for Sandy Williams and Feinberg in connection with the titanium venture. (*Wms.* Trial Tr. 4233–34.) On January 11, 1979, in their first meeting with Abdul representatives, the Senator's associates were seeking a loan of $12 million or $13 million to buy land and an abandoned plant at Piney River, Virginia. By March 8, 1979, Sandy Williams was already trying to get Weinberg interested in a processing plant in Georgia owned by the American Cyanamid Company (*see Wms.* Gov't Trial Ex. 1A, at 1, Sen. Comm. Print, Pt. 6, at 1), and on April 3, 1979, Sandy Williams requested a loan of $83 million for the Piney River properties and the American Cyanamid plant

---

[160] The guideline incorporating that requirement was not promulgated until January 5, 1981, but FBI Director William H. Webster has testified that the requirement was in effect during Abscam. (FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 1st & 2d Sess. 167–77 (1979–80) (testimony of William H. Webster).)

[161] His concealed share was 18 percent of the corporation, and the venture was getting a $100 milliion loan.

[162] The expected profit was $70 million; his 18 percent amounted to $12.6 million.

[163] The sheik never mentioned a figure before the money was declined. A $40,000 payment had been approved by FBI HQ. (Deleted)

(*Wms.* Gov't Trial Ex. 4A, at 4-5, Sen. Comm. Print, Pt. 6, at 40-41).[164]

The projected profits from the fictive resale are more troubling to the Select Committee. Unlike the original loan, that inducement was millions of dollars in pure profits for the Senator. In addition, the government fabricated out of whole cloth both the fictitious buyers and the fictitious resale price.

The idea of a resale was discussed by Weinberg only a few days after the July 11, 1979, meeting that established the corporate structure of the titanium venture. George Katz told Sandy Williams shortly after that meeting that Weinberg had told him that a second group of Arabs was interested in buying the venture for $70 million in profits, provided the Senator would agree to stay involved. (*Wms.* Trial Tr. 1618.) Weinberg told Errichetti of the plan on July 25, 1979. (Sen. Comm. Print, Pt. 6, at 416-22.)

The first time Senator Williams learned of the possible resale was on August 5, 1979. Errichetti, Weinberg, and DeVito (Special Agent Amoroso) met the Senator at the John F. Kennedy Airport in New York as he was preparing to fly to Europe on vacation. Errichetti gave him his shares of the titanium corporate stock, endorsed in blank by Feinberg, and told him that there was a strong possibility of a dual closing—getting the $100 million loan from Abdul, buying the Piney River properties and the American Cyanamid plant, and then reselling everything to a second group for a $50 million profit. (*Wms.* Gov't Trial Ex. 21A, at 5, Sen. Comm. Print, Pt. 6, at 187.) Weinberg told him he was in contact with the principals of the second group; he said that there was a tentative offer of $50 million, but that he wanted more.[165] (*Id.* at 14-15, Sen. Comm. Print, Pt. 6, at 196-97.)

Amoroso testified that the idea for the resale was jointly concocted by himself, Good, and Weinberg. It was designed, Amoroso said, to gain time, because the FBI had neither the intention nor capability of making a $100 million loan, and for other unspecified reasons. (*Wms.* Trial Tr. 1118-22.)

The Select Committee concludes that another reason for the resale scenario was the desire to have Senator Williams commit himself yet again to misuse his office. There is nothing improper in the government's decision to build as strong a case as possible against Senator Williams. The Select Committee finds troubling, however, the FBI's repeated advances to Senator Williams and the size of the inducements involved.

Judge Pratt held that, given his position and background, the $12.6 million in profit to Senator Williams was not so large as to constitute entrapment or due process outrageousness. (*United States* v. *Williams,* 529 F. Supp. at 1102.) In *United States* v. *Myers,* Judge Pratt said:

> No matter how much money is offered to a government official as a bribe or gratuity, he should be punished if he accepts. It may be true, as has been suggested to the court,

---

[164] The total amount of $100 million was finally agreed upon by Weinberg, Katz, and Sandy Williams on May 8 and 9, 1979, in Georgia while inspecting the Cyanamid plant. (*Wms.* Trial Tr. 1593.) As explained above (*see* p. 218 *supra*) there are no recordings of these meetings.

[165] Senator Williams testified that he discounted this story. (*Wms.* Trial Tr. 4410, 4422.)

> that "every man has his price"; but when the price is money only, the public official should be required to pay the penalty when he gets caught. (527 F. Supp. at 1228.)

The Select Committee agrees with Judge Pratt and concludes that the size of the bribe does not exonerate Harrison Williams of wrongdoing. Senators hold high positions of public trust, and they regularly deal with matters of national and international importance. They should be held to correspondingly high standards. The amount of money offered to Senator Williams is astonishing, but the office of a Senator should not be for sale at any price.

Despite Senator Williams' culpability, however, the Select Committee finds that the government's offer of an instantaneous $12.6 million profit demonstrated unsound investigative and prosecutorial judgment. There must be wiser, more desirable, more efficient uses of scarce prosecutorial resources than to offer a bribe at a level far beyond anything ever previously proved against a person in a like position. It is no mere oversight that the government has not, to this day, adduced any evidence that any Congressman had ever previously been offered $12.6 million for the sale of his public trust. Indeed, the ready acceptance of sums ranging from $5,000 to $40,000 by other Congressmen caught in Abscam suggests that those sums are either at or above the level of inducements one might consider to be "real-life" inducements. The amount of $12.6 million exceeds the largest of those by some 31,500 percent.

5. Deliberate Interruption of the Senator's Refusal of a Bribe

Senator Williams alleges that he was deliberately interrupted on January 15, 1980, when he was in the course of refusing to take money in return for helping the sheik with immigration problems. The Select Committee has viewed the January 15 videotape, studied the transcript, and examined the testimony of the government agents who arranged, conducted, and monitored the meetings. The Select Committee concludes that there was no deliberate interruption. The two interruptions were unfortunate, in that they raised doubts about how fairly the Senator was treated, but the Senator was not significantly harmed by them. While on camera, he several times refused the cash, and he even explained the basis for his refusal.

DeVito (Special Agent Amoroso) introduced Senator Williams, George Katz, and Alex Feinberg to Sheik Yassir Habib (Special Agent Farhart), and then withdrew with Katz and Feinberg. (*Wms.* Gov't Trial Ex. 25A, Sen. Comm. Print, Pt. 6, at 348.) As he withdrew, DeVito stated that a call the sheik had been expecting had not yet come, and he asked the sheik if he wanted to be interrupted if the call should come. The sheik said, "Yes."

The sheik assured Senator Williams about the titanium deal, but told him that he wanted the Senator's assistance in getting legislation allowing him to stay in the United States. Williams replied that such private legislation was possible, but was very difficult to pass. The Senator said that he would need good reasons to support the sheik's immigration. (*Id.* at 3–5, Sen. Comm. Print, Pt. 6, at 350–52.)

Eventually, the sheik raised the subject of money:

> **Sheik**: I, I will for, for your help, assistance, and assistance—I would like to give you, you know, some money for, for permanent——
>
> **Senator Wms**: No.
>
> **Sheik**: Residence.
>
> **Senator Wms**: No, no, no. This, this is . . . When I work in that area, that kind of activity, it is purely a public not, no.
>
> [DeVito here walks into the room and interrupts, saying he will transfer a call.]
>
> **DeVito**: Excuse me, gentlemen. Er, Sheik Habib, er, the call is, is here. I told him to ring you on the telephone in here. O.K., so, as soon as it rings you can answer it. I'll have to transfer it.
>
> **Senator Wms**: O.K., Tony. You are most gracious. Within our, my position, when I deal with law and legislation, it is, it is, it is not on, it's, it's, er, not with, within——
>
> [Phone rings. Sheik leaves. Interruption in audio and video. Sheik returns.]
>
> **Senator Wms**: . . . No, the, er, my interest is with my associates . . . So my only interest is to see this come together. And the, and the the, elements that I can help with, your, your personal situation. Er, I am very, I find it, er, a desirable thing to, for you, personally. And it's part of creating something of value, bringing in that ore. (*Id.* at 8–9, Sen. Comm. Print, Pt. 6, at 355–56.)

The sheik than asked Senator Williams for more detail on the legislative process. When the Senator began to ask personal questions, the sheik shifted the conversation back to the titanium mine. The Senator pressured the sheik on the timing of that deal. The phone then rang again (this time without DeVito's first having announced it), and the sheik again left the room to answer it. (*Id.* at 12, Sen. Comm. Print, Pt. 6, at 359.)

When the videotaping resumed, Senator Williams told the sheik he had to leave. The sheik said that the mine deal would be closed by the end of the month, if he was assured of permanent residence. Senator Williams responded:

> You can leave with my assurance that I will do those things that will, will bring you on for the consideration of permanency. Quite frankly, I can't issue that.
>
> * * * * * * *
>
> I cannot personally. It, it is a law. And it has to be, goes through the whole dignified process of passing a law. I can give you my pledge. I will do all that is necessary to get that to the proper decision. You see. (*Id.* at 13, Sen. Comm. Print, Pt. 6, at 360.)

After Senator Williams once more gave his "absolute pledge" to "do everything in [his] power to advance [the sheik's] permanency," the sheik and Williams left to rejoin the others. (*Id.* at 14, Sen. Comm. Print, Pt. 6, at 361.)

Supervisor Good testified at the *Williams* due process hearing that the January 15, 1980, meeting was arranged for Senator Williams to agree to help the sheik in return for the titanium loan.[166] (*Wms.* D.P. Tr. 830.) The FBI was also going to offer him a cash bribe, if the opportunity arose, as icing on the cake. The FBI internal document requesting approval of the money, however, made no mention of this dual purpose; it merely asked for authorization to present a cash bribe to Senator Williams. ([Deleted]; *see Wms.* D.P. Tr. 863.) During the meeting, Good, after discussing it with Puccio, interrupted the sheik and told him to get Senator Williams to be more specific about what he was willing to do to help the sheik. Good first sent DeVito in to alert the sheik that a call was coming. (*Id.* at 837.) To do so, Good had to leave the room in which he and Puccio were monitoring the meeting. That room was next to the room where the Senator and the sheik were meeting. In testifying, Good was unclear as to how long this took, but he thought the time was short—several seconds, at most. He testified that he decided to interrupt before the offer of money was made. (*Id.* at 846.)

Good repeated this account in his testimony before the Select Committee. Good testified to the Select Committee that he had gone into the hallway to tell Amoroso to alert Farhart about the call before Farhart made the bribe offer. The timing was merely a coincidence. (Sel. Comm. Hrg., July 27, 1982, at 187–88 (testimony of John Good).) Later, Good interrupted a second time to get Farhart to link the titanium loan directly to Williams' help on immigration matters. This time, however, he did it by calling Farhart directly, because he did not feel it necessary to send in Amoroso; he knew that Farhart would be sure who was calling and would not become flustered. (*Wms.* D.P. Tr. 865.)

Farhart's testimony corroborates Good's. When he had what he thought was an assent by Williams to introduce legislation, he offered the Senator money. (*Id.* at 138.) In accordance with his prior instructions, when the offer was refused, the subject of money was dropped. As Senator Williams was refusing the money, Amoroso interrupted, and a call then came. The call was from Good, who told him to get Senator Williams to be more specific. Later, Good called again to get him to link the immigration bill and the titanium deal directly. (*Id.* at 177.)

Puccio testified at the *Williams* due process hearing that Good had sent in Amoroso after Puccio and Good had discussed the need to talk to Farhart. Puccio and Good thought that Senator Williams was not being specific enough. (*Id.* at 473–74.) Before the Select

---

[166] A document in the files of the Department of Justice, dated November 27, 1979, states that it would be necessary to recontact Senator Williams to obtain an overt act, and that if an overt act was obtained, a prosecutable case of bribery and conspiracy would be made out. ([Deleted], *reprinted in* 128 Cong. Rec. S 1511 (daily ed. Mar. 3, 1982).) Senator Williams argued that this memorandum establishes that the government agreed that, as of November 1979, it had an incomplete case against him.

The Select Committee agrees with the conclusion of Judge Pratt: "Merely because some government employees were not overly impressed with the strength of the Williams case as of November 27, 1979, does not mean that the government was precluded from testing the sufficiency of its evidence before the grand jury in obtaining an indictment or from convincing a petit jury of defendant's guilt beyond a reasonable doubt . . . .

"The court concludes that the existence of the November 27, 1979 memorandum suggesting that further specific proof be adduced of Williams' criminal propensity before seeking an indictment against him does not preclude the government from proceeding even when the additional evidence is not forthcoming." (*U.S.* v. *Williams* 529 F. Supp. at 1100–01.)

Committee, Puccio testified that Good left the room because he and Good had discussed the need for Farhart to be more specific. Farhart was ill-informed about the details of the operation, and Puccio was uncomfortable with offering Senator Williams a bribe without specific statements about what he was willing to do. Unfortunately, while Good was out of the room, the bribe offer was made. (Sel. Comm. Hrg., July 27, 1982, at 188–90 (testimony of Thomas Puccio).)

Amoroso testified that he was stationed in the hall outside of the room where Senator Williams and the sheik were meeting. Good told him to tell Farhart a telephone call was coming. The whole episode took 10 to 15 seconds. (*Wms.* D.P. Tr. 1101.) The reason that Amoroso was to deliver the message, which was agreed upon before the meeting, was because a man of the sheik's stature would not just answer his own phone without some help. (*Id.* at 1105.) Amoroso had no explanation for why he was not told to announce the call the second time Good called.[167]

The Select Committee agrees with the uncontroverted testimony of Puccio and Good that there was no deliberate interruption of Senator Williams as he rejected the money. There is no dispute that, prior to Senator Williams' arrival, the government had arranged a way to contact Farhart during the meeting. When he left Farhart and Senator Williams alone, Amoroso expressly stated that he was going to interrupt for an important call. The interruption was clearly planned because of Farhart's unfamiliarity with the case scenario and because he needed more guidance than Amoroso would have needed.

Williams claims in his appeals brief that:

> While the possibility of interruption was discussed, their timing certainly was not discussed in advance. It is hard to believe that the precise simultaneity of the Senator's attempts to explain his refusal of bribe money and the interruptions was sheer coincidence. (*Wms.* Def. Appellate D.P. Brief 50 n. 20.)

To the contrary, the Select Committee finds that the simultaneity makes the government's position more believable. Presumably, Good and Puccio did not want to interrupt Williams while he was taking a cash bribe. Therefore, if the interruption were deliberate, the earliest it could have been decided upon was after Williams said no. Good would have had to have heard the word, "No," jumped up, left his room, and spoken to Amoroso. Amoroso would then have had to enter the room occupied by Senator Williams. The entire operation, from conception through execution, could not have been completed in the time that actually elapsed.

---

[167] Judge Pratt did not accept Williams' argument that the interruptions during his January 15, 1980, meeting with the sheik were deliberate attempts to prevent him from exonerating himself. First, the interruptions were planned in advance; Amoroso set up the scenario as he introduced Williams to Farhart. Second, Pratt believed the testimony of Good, Amoroso, and Puccio that the decision to send in Amoroso was made before Williams had turned down the money. And third, there was no prejudice, even if the interruption was intentional, because Senator Williams did turn down the money on camera and explained why. (529 F. Supp. at 1099–100.)

Judge Pratt stated: "But the tape also shows that the interruption did not disrupt Williams' explanation of his position, for when the conversation and the tape resumed, Williams immediately picked up the same subject and stated in substance that what he wanted from the sheik was not a cash payment, but the sheik's financing for the titanium project." (*Id.* at 1100.)

C. ALLEGATIONS REGARDING KENNETH N. MACDONALD

Throughout the covert stage of the Abscam undercover operation, Kenneth N. MacDonald was Vice Chairman of the New Jersey Casino Control Commission. He resigned from his position on February 4, 1980, after having been mentioned by the news media as a target of the investigation. MacDonald was indicted on June 18, 1981, but died on April 17, 1982, while his case was still pending. The indictment was dismissed on May 6, 1982.

MacDonald's lawyer, Justin P. Walder, former Assistant United States Attorney for the District of New Jersey Edward J. Plaza, Assistant United States Attorney for the District of New Jersey Robert A. Weir, Jr., and some members of the press have alleged that MacDonald was unfairly prosecuted. They further allege that the problems with the MacDonald case taint the other Abscam cases and that MacDonald was indicted primarily for the improper purpose of preserving the other Abscam convictions. Plaza, for example, testified before the Select Committee that MacDonald had been an "unwitting dupe" and claimed "that there is more than a reasonable doubt that Kenneth MacDonald was not guilty of anything and yet was indicted." (Sel. Comm. Hrg., July 28, 1982, at 38, 48 (testimony of Edward J. Plaza).) Weir testified before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary that the MacDonald case "creates a cancer that spreads to the other cases." (House Jud. Subcomm. Hrg., June 2, 1982, at 68 (testimony of Robert A. Weir, Jr.).) Indeed, the arguments advanced by these advocates were so emphatic that, when combined with a preliminary and incomplete review of the confidential FBI and Department of Justice Abscam files, they caused the Select Committee's counsel in their interim report on August 18, 1982, to suggest that there was substantial evidence that Errichetti had duped MacDonald.

MacDonald was charged with crimes arising out of his allegedly having received a bribe on March 31, 1979. MacDonald did not receive money directly from FBI undercover operatives on that date; rather, the Mayor of Camden, New Jersey, Angelo J. Errichetti, received the money in MacDonald's presence. MacDonald's defenders argue that MacDonald did not know the purpose of the transfer of money and never received any of it. They argue that Errichetti, acting in conjunction with Weinberg, had duped MacDonald into appearing to have sold his office. They further argue that Errichetti and Weinberg split the money between themselves. Finally, they argue that the government became aware of Weinberg and Errichetti's deception and nevertheless prosecuted MacDonald.

Since August 18, 1982, when the Select Committee's counsel submitted their interim report, they and the Select Committee have reviewed thousands of additional documents, viewed the March 31, 1979, tape several times, listened to the numerous relevant audio tapes, taken the testimony of FBI Director William H. Webster, taken the testimony of Errichetti and Weinberg, interviewed Errichetti's nephew, interviewed all of the FBI agents and federal prosecutors who played a central role in the MacDonald investigation in the first four months of 1979, interviewed Justin Walder by telephone, listened to the testimony of Justin Walder before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, and obtained and reviewed a massive quantity of additional evidence somewhat less centrally related to the MacDonald investigation. Having thus reviewed substantially more evidence than that on which Walder, Plaza, Weir, and others who contend that MacDonald was duped have based their contention, the Select Committee finds that the weight of the evidence shows that MacDonald knowingly attended the March 31, 1979, meeting with the intent of using the influence of his public office for the purpose of enabling his companion, Angelo Errichetti, to obtain a payment of $100,000 and for the further purpose of obtaining either an immediate or a future benefit for himself. The Select Committee rejects the contention that the government had improper motives in indicting MacDonald. The Select Committee also concludes, however, that the MacDonald investigation was poorly managed and supervised and that the meeting on March 31, 1979, should have been more carefully structured and conducted.

1. Reasonable Suspicion Regarding MacDonald

Plaza and Weir have alleged that there are tape recordings that make clear that Errichetti and Weinberg were in a conspiracy to deceive both McCloud (Special Agent McCarthy) and MacDonald. They claim that the record is clear that Errichetti and Weinberg were planning on luring MacDonald to a meeting that would only appear to be a payoff implicating him. They also claim that Weinberg and Errichetti planned to keep all the money for themselves. Plaza and Weir argue that the government should have been aware of this conspiracy and should not have allowed MacDonald to be duped. (*See* House Jud. Subcomm. Hrg., June 2, 1982, at 31, 57 (testimony of Edward J. Plaza).)

In addition, Walder argues that Errichetti demonstrated, from the beginning of the investigation of MacDonald, that he, Errichetti, was unreliable. Walder argues, therefore, that, during the covert stage of the Abscam investigation, the government never should have relied upon Errichetti's allegations to justify an investigation of MacDonald. (*See* House Jud. Subcomm. Hrg., Sept. 13, 1982 (written statement of Justin P. Walder at 3).)

There are transcripts in which Errichetti says that MacDonald does not want any money, and is not going to receive any money. (*See, e.g.*, [Deleted],[168] *reprinted in* 128 Cong. Rec. S 1502-03 (daily ed. Mar. 3, 1982).) The evidence that Errichetti was never planning to pay MacDonald, however, must be considered in conjunction with contemporaneous evidence in which Errichetti was unequivocally alleging that MacDonald was corrupt. Moreover, even if MacDonald was not planning to receive any of the cash to be paid to Errichetti on March 31, 1979, he could just as well have been willing to sell his influence in return for future compensation or for a benefit for one of his relatives or to assist Errichetti because of past favors.

As is shown below, there is and was evidence to support all of those explanations for MacDonald's conduct. The Select Committee concludes, therefore, that the FBI was entitled to rely on the representations of Errichetti that MacDonald was corrupt: The government had articulable facts supporting a reasonable suspicion justifying an offer to MacDonald of the opportunity to commit a crime on March 31, 1979.

---

[168] The omission of a citation to a confidential document is identified by "[Deleted]." *See* pp. V-VI *supra*.

Errichetti was introduced to Abdul Enterprises by William Rosenberg and William Eden on December 1, 1978. At that meeting he indicated through his intermediaries that he would assist Abdul Enterprises in obtaining a casino license in return for a payment of $350,000 to $400,000, of which $100,000 would be paid as a downpayment. He, Errichetti, would distribute the money to the necessary people. ([Deleted])

On January 8, 1979, Errichetti met with Weinberg, Rosenberg, and Eden and discussed payoffs to members of the Casino Control Commission on behalf of Abdul Enterprises. During the course of the meeting, Errichetti agreed to reduce to $25,000 his demand for a downpayment. (*See Kelly* Def. Trial Ex. 19.)

On January 9, 1979, Errichetti met alone with McCloud. Errichetti bragged about his influence, his power, and his control over three of the members of the New Jersey Casino Control Commission. He said that three of the five were his "nominees" and that MacDonald already had taken a bribe of $162,000 through Errichetti to assure Resorts International's casino license. ([Deleted]) Errichetti said that he wanted $25,000 as a downpayment and a total of $400,000 to ensure Abdul's license.

Walder relies upon portions of the January 9 transcript as proof of his proposition that Errichetti was unreliable. Walder claims that Errichetti made the following errors on January 9, 1979: (1) he identified three of the five members of the Casino Control Commission as "his" nominees, when, in fact, Errichetti had no nominees; (2) he referred to a black man as a member of the Commission, when no black man was on the Commission; (3) he referred to Mr. "Collozzi" and Mr. "Roth" as members, when no member was named Collozzi or Roth; and (4) he claimed to control three of the five Commissioners, when four out of five were needed to obtain a casino license. The Select Committee's careful listening to the tape in question reveals that Walder's allegations in that regard are completely groundless, a conclusion fully supported by extrinsic evidence obtained by the Select Committee.

Early in the recorded conversation Errichetti outlined for McCloud the source of his political strength. Walder relies upon the following transcript excerpt, prepared by the FBI, as proof of Errichetti's ignorance:

> ERRICHETTI: My strength is political here.
>
> MCCLOUD: In this town?
>
> ERRICHETTI: As well as Camden. Anything I want. Three solicitors, you know Planning Board, State Senators, uh, you name it. I got the strength. (Inaudible) and the most ultimate strength is the Casino Commission . . . Ken McDonald [sic], the Vice Chairman . . . I was told.
>
> MCCLOUD: I see, the Vice Chairman's uh.
>
> ERRICHETTI: Of the commission. The Chairman is a full-timer at $60,000 and it should be brought out, my nomi-

> nee. Kenneth McDonald, Vice Chairman, businessman, multi-millionaire, Ford distributor-east coast, $18,500 part-time Commissioner, my nominee. Schvatza (phonetic-meaning black), one year term (inaudible), should be coming here this morning. He's from ten miles from the house where I live. He's black and I named a black person. He's my nominee. The other fellow from North Jersey I don't know. Italian fellow named Joe somebody, I know him, but he's not my nominee . . . and the fellow Murke (phonetic) who's not my nominee, the other person. (House Jud. Subcomm. Hrg., Sept. 13, 1982 (written statement of Justin P. Walder, Ex. A).)

Through its own research the Select Committee has determined that the members of the Casino Control Commission on January 9, 1979, were Chairman Joseph P. Lordi, and Commissioners Prospero DeBona, Alice D. Corsey, Albert W. Merck, and Kenneth N. MacDonald. (State of New Jersey, 1979 Official Directory 74.) In the language quoted above, Errichetti clearly identified Commissioners MacDonald and Merck, although the FBI transcriber misspelled their names. He did not mention Chairman Lordi by name, but he did so shortly thereafter, on January 20, and in subsequent contacts with the undercover agents.[169] He also identified a Commissioner of Italian descent named Joe who came from northern New Jersey. Prospero DeBona was an Italian-American from Rumson, New Jersey, which is located in northern New Jersey. Soon after the January 9 meeting, Errichetti mentioned DeBona by name several times.[170]

The quoted transcript has Errichetti referring to a black person three times as *"he."* Commissioner Alice Corsey was a black *woman* from Westville, New Jersey. When the Select Committee listened to the tape, it clearly heard some of the references to the black commissioner as *"she."*[171] Moreover, from the context of the conversation, Errichetti obviously was referring to Corsey. He said that the black commissioner lived ten miles from his home, and Westville is within ten miles of Camden. Thus, rather than being mistaken, Erricheti correctly identified, either by name or by attributes, the entire membership of the Casino Control Commission.

Walder also is incorrect when he alleges that in the following language Errichetti misidentified Colozzi and Roth as members of the Casino Control Commission:

> ERRICHETTI: Before you don't get nothing. You're too fucking late under all normal circumstances. You're too fucking late. Everybody's in here already. That's why I've gotta move this as fast as I can because everyone's jumping on everyone's fucking head. That's one of the big things I've gotta do. To move you from fucking 13 to 5 or 6

---

[169] *See, e.g.,* [Deleted]

[170] *See* [Deleted]

[171] The transcript has three personal pronouns that refer to the black member of the Commission. On the tape, two of these references do sound somewhat like he. One additional reference, which was labeled "inaudible" on the transcript, sounds clearly like "*she* should be here this morning." Also, the sentence "*He's* my nominee," is clearly "*She's* my nominee." The two references that do sound somewhat like *he* are not nearly as audible as the two that clearly say *she.*

> or 7 or 8. After I, I'm a little leary. There's only one, actually one that's in operation. The others have had their applications, have had their money up, but that don't mean bullshit. They're gonna get it, but they're gonna have to pull fucking teeth. I'll tell you. They'll be crossing every T and dotting every I. (Inaudible) Mayor (Inaudible), Pierre Hollingsworth (Phonetic), commissioned by the Governor. There are five commissioners, one of which depicts himself as the mayor, not elected by the people. So he is subservient to the other four guys. Commissioner Roth, a Jewish fellow, on the bible, he will do no wrong. The black guy, whatever I want, O.K. Commissioner Colozzi, whatever I want. Two of them are mine and then the mayor falls in line. I met each one head on head by themselves. Again, not with anything except I need your help to get through, honest to goodness, clean people to operate a decent first-class operation and I get a finder's fee. I told them that. (House Jud. Subcomm. Hrg., Sept. 13, 1982 (written statement of Justin P. Walder, Ex. B).)

Far from being evidence that Errichetti had not known the identity of the Casino Control Commissioners, as Walder contends, the quoted language offers even further proof of Errichetti's knowledge and control of New Jersey and Atlantic City politics. In the quoted language, Errichetti was referring to the local governing body in Atlantic City at the time, the City Commission. Errichetti's references to the "mayor" as a member of the commission plainly show that he was not talking about the Casino Control Commission.

Further, when Errichetti and McCloud spoke on January 9, the members of the Atlantic City Commission were Major Joseph Lazarow and Commissioners Edmund Colanzi, Pierre Hollingsworth, Edwin Roth, and Horace Bryant. Therefore, Errichetti correctly identified Roth, Hollingsworth, Colanzi,[172] and, by office, the mayor. (One cannot tell from the tape whether Errichetti mentions Lazarow as mayor, because the reference is inaudible.) He does refer to a black man, however, and both Horace Bryant and Pierre Hollingsworth are black.

It is unimportant whether Casino Control Commissioners Lordi, MacDonald, and Corsey were Errichetti's nominees in any formal legal sense. Errichetti was a state senator, as well as the Mayor of Camden, and was a powerful figure in the state legislature. The Select Committee concludes that when Errichetti called the three commissioners his "nominees," he meant that he either had suggested or had provided key support for their nominations.

Similarly, in the discussion about the number of commissioners Errichetti controlled, he never contended that he controlled enough members to satisfy the technical requirements of the New Jersey gaming statute. The relevant dialog is as follows:

> McCLOUD: There's five on the commission four out of the five. . . .

---

[172] The transcript reads "Colozzi" rather than "Colanzi." Errichetti's voice is not distinct at that point. It is possible that he said Colanzi or that he was slightly incorrect in his pronunciation. Either way, the Select Committee concludes that he clearly meant to refer to Colanzi.

> ERRICHETTI: Three out of the five.
>
> McCLOUD: Three out the five are yours. In other words, the majority you're the majority then.
>
> ERRICHETTI: Yeah. So that's where my strength comes from. Implication or from people knowing (inaudible). Ken MacDonald and those fellows had the opportunity with the hearing Officer two weeks ago when they nailed him to the fucking cross. (Inaudible) Jesus Christ they're gonna kill us. Next thing, when I met with MacDonald, that was his office, not mine, cause he has an emergency in his family. I said, "Ken, you ain't gonna kill us." He said, "how much?" "162,000." He said, "done." This guy was tickled to death. He would have gave him, he would have given him a million dollars.
>
> McCLOUD: [Laugh] Right.
>
> ERRICHETTI: If they, if they didn't get past that first hurdle they wouldn't get here, where they are yesterday. So, you know, for you to sit where you are and question where I come from I have no problem.
>
> McCLOUD: No, I'm not questioning it, but I have to be sure when I put in so much money, really, that I'm gonna get my money's worth, that I'm not making any contributions to political campaigns or something like that. I want to make sure that I'm getting. . . . (House Jud. Subcomm. Hrg., Sept. 13, 1982 (written statement of Justin P. Walder, Ex. A).)

It is true that Errichetti was bragging to impress McCloud and that McCloud seemed impressed that Errichetti had a majority of the commissioners in his control. To leap, however, to the conclusion that Errichetti's claims of influence were therefore discredited because the votes of four commissioners were needed to grant a casino license, is entirely unwarranted. Errichetti was speaking to McCloud as a corrupt public official describing the magnitude of his political strength. Control of a majority of the Commission was a relevant and important consideration. That he did not claim to control a legally sufficient majority was irrelevant in the context of the discussion and did nothing to discredit him. Moreover, the most important claim he made was that MacDonald already had been able, in return for a bribe, to resolve someone else's problems with the Commission. Errichetti was claiming effective control, not legal control.[173]

On January 20, 1979, Errichetti travelled to Abdul Enterprises offices to collect the $25,000 he had demanded as a downpayment to help obtain a casino license for the sheik. Errichetti told McCloud during the meeting that MacDonald "is the key, really; he's number one." Errichetti explained that he was close to MacDonald, having just recently attended MacDonald's deceased wife's viewing,[174] and that members of MacDonald's family were connected with organized crime. ([Deleted]) The apparent closeness of the Errichetti-MacDonald relationship reflected by those statements provided further evidence that Errichetti knew MacDonald well enough to know whether he was corrupt.

---

[173] Moreover, in conversation on March 23, 1979, between Errichetti and Weinberg, Errichetti said that [deleted] was independent, but that he, Errichetti, controlled the other four Commissioners. [deleted], however, was considering retiring to become a [deleted]. The omission of sensitive information is (identified by "[deleted]." *See* pp. V–VI *supra.*) Errichetti told Weinberg that he was going to make sure that [deleted] replacement would also be amenable to his control. The replacement would, in other words, have been Errichetti's "nominee." ([Deleted])

On February 12, 1979, Errichetti met with Weinberg and DeVito (Special Agent Amoroso) in Atlantic City. Errichetti expressed reluctance to allow anyone to talk to MacDonald. He wanted to be sure no one said anything untoward:

> DeVito: Would, would there be any problem in him [McCloud] meeting MacDonald?
>
> Errichetti: No, I think I can arrange to have dinner one social. But he's gotta be nice and keep his mouth shut. I got to tell him what to say, you know.
>
> Weinberg: Now, he's he's the (inaudible) man MacDonald.
>
> DeVito: Well, like you said if you can arrange to have him meet MacDonald and he gives him some assurances that, you know.
>
> Errichetti: He won't talk to him.
>
> DeVito: He won't?
>
> Errichetti: Nobody's gonna talk to him.
>
> DeVito: Well at least for him to meet him, that may satisfy him. What the hell. (House Jud. Subcomm. Hrg., Sept. 13, 1982 (written statement of Justin P. Walder, Ex. D).)[175]

After Weinberg and DeVito had left on February 12, McCloud arrived to meet with Errichetti. Errichetti invited him to have dinner with MacDonald in the future, but (as he had told DeVito he would) admonished him not to discuss the proposed casino license with MacDonald. Errichetti said that he had told MacDonald that McCloud wanted a "complete assurance" of a license for Abdul, because Abdul was interested in a legitimate business venture. Errichetti also said that he had told MacDonald that McCloud was "not trying to bribe you, [he] just wants to know you." According to Errichetti, MacDonald had replied, "No Angelo, I'm not interested in money; I'm doing it for you." [(Deleted]) (It should be noted at this point that the crime of bribery includes a promise to use one's public office in return for a benefit to be bestowed on another person.)

At the same time as Errichetti was verbally insulating MacDonald, he was writing a note. The note had "$100,000" written on it.

---

[174] This was confirmed by Errichetti's nephew, Joseph DiLorenzo, who, in addition to serving as Camden's Administrator of Energy, also served as Errichetti's occasional chauffeur. DiLorenzo was interviewed on June 10, 1980, by Special Agent Martin F. Houlihan of the Newark office of the FBI and by Plaza and Weir. DiLorenzo told them that he had driven Errichetti to MacDonald's wife's viewing. (Martin F. Houlihan FD 302, June 10, 1980.)

[175] Walder argues that Amoroso inappropriately coached Errichetti on what to say to McCarthy. (*See* House Jud. Subcomm. Hrg., Sept. 13, 1982 (written statement of Justin P. Walder at 4).) The Select Committee disagrees. Amoroso was merely trying to break through Errichetti's insulation of MacDonald so that the criminal act by MacDonald, if one were to occur, would be clear. Obviously, any corrupt, cautious politician is going to try to avoid personal involvement in the corrupt act; it is no mere fortuity that the word "bagman" has long occupied a central place in the argot of the criminal world. The evidence reviewed by the Select Committee in Abscam, Buyin, and Labou suggests that for almost every corrupt public official there is at least one corresponding bagman.

As he showed it to McCloud, Errichetti said, "That's for four," to which McCloud replied, "That's for all four of 'em." Errichetti then said, "Ten down. Ten percent." Errichetti told McCloud, "You couldn't hand them anything, 'cause that would be the end of it. I'm their bag guy. They're gonna deal with me. I'm gonna deal with you." ([Deleted])

On March 5, 1979, McCloud met MacDonald and Errichetti for dinner at the Cherry Hill Hyatt House. During the meeting MacDonald made no explicitly inculpatory statement. He did, however, engage in a prolonged private discussion about casino licenses with a person whom he believed to be seeking such a license. He told McCloud that the site of the proposed casino was the key factor in getting a license and that it was important to cooperate with the Commission and its staff. MacDonald also stated that he was loyal to Errichetti. ([Deleted])[176]

Walder argues that the March 5 meeting was so non-incriminating that the government had said prior to MacDonald's death that it would not use the tape in its prosecution of MacDonald. He claims that everything that MacDonald said during the meeting was perfectly proper. (House Jud. Subcomm. Hrg., Sept. 13, 1982 (written statement of Justin P. Walder at 4).) The Select Committee disagrees with Walder's conclusion. MacDonald's meeting with McCloud justifiably heightened the FBI's reasonable suspicion that MacDonald was corrupt. The Casino Control Commission had been established because of the public's suspicions about casino gambling. The Commissioners were to be above suspicion. At the very least, MacDonald showed questionable judgment in socializing with a casino license applicant with whom he had literally no other reason to meet. (Sel. Comm. interview of Gerald McDowell, Sept. 3, 1982.) MacDonald's willingness to talk at length under those circumstances about licensing procedures strongly suggested something worse than a mere error in judgment.

Prior to the March 5 dinner meeting, Errichetti told McCloud that MacDonald would take a $100,000 bribe, with $10,000 as a downpayment. ([Deleted]) Afterwards, Errichetti told McCloud that MacDonald had spoken unguardedly. Errichetti said, "I'm hanging my fucking star on this guy." ([Deleted]) The next morning, in a meeting over breakfast, Errichetti disclaimed any knowledge or interest in how MacDonald planned to compensate the other Commissioners:

> McCLOUD: Now, I imagine Ken understands the arrangement . . . he mentioned it last night.
>
> * * * * * * *
>
> McCLOUD: What's he, is he gonna take care, whoever has to taken care of I guess.
>
> * * * * * * *
>
> McCLOUD: I didn't want to bring it up last night, I didn't think it was appropriate.
>
> ERRICHETTI: No, if you had done that it would——

---

[176] DiLorenzo told the FBI on June 10, 1980, that Errichetti had told him that the meeting had concerned casino licensing procedures. (Martin F. Houlihan FD 302, June 10, 1980.)

McCloud: Be good-bye time.

Errichetti: Yeah, really. He maintains a high profile and he is, he's a decent person. ([Deleted])

In a report that accompanied the transcript of that March 6 breakfast meeting, McCarthy wrote that Errichetti had claimed to be very close to MacDonald. Errichetti had said that he paid off MacDonald by pressing money into his hand as cigar money. ([Deleted])

In a tape of a meeting between Errichetti, Weinberg, and DeVito on March 8, 1979, Errichetti said that he was not going to pay MacDonald any money and did not want anyone from Abdul Enterprises to mention money to MacDonald:

DeVito: You never know what he's [McCloud] gonna say and why he's gonna say it.

Errichetti. Like I was hoping and praying he didn't say anything to MacDonald, which he didn't.

DeVito: Well . . .

Weinberg: You are lucky.

DeVito: You were lucky that time, but he's liable to say something to MacDonald after——

Errichetti: (Inaudible.)

Weinberg: And you can.

Errichetti: I tell you he's gonna go to us, he ain't gonna go to fucking MacDonald, I tell you right now. Fuck that shit I'm gonna go pick it up, right?

Weinberg: I don't know what he's gonna do. He let me believe he was going to MacDonald.

DeVito: Yeah, he was under the impression that he was gonna go to MacDonald. Hey, I'm only telling you what . . .

Weinberg: Let me explain. Sometimes it's better to let him do with the ten and the balance we can always grab.

* * * * * * *

Errichetti: Well, I said to him . . . wait a minute. He can't fucking believe that. When he left that night, I said to him . . . He said "I'm gonna mention an amount." I said, "Wait a minute: you don't fucking mention money to him. You fuck. I'll give it to him and say go buy a cigar."

Weinberg: Well, anyway, let me ask you a question: Anyway you can arrange that he gives you the envelope, and you hand the envelope to him in front of him?

Errichetti: Oh, no way, no way. Here's a guy gonna sit in judgment and he's gonna have two fucking guys know that . . . Me is bad enough.

Weinberg: Well, then let you give it to him, and the balance we can always glom. I'd rather have the guy get his feet wet. He sees the money's there and wants it.

Errichetti: *MacDonald ain't doing it for money ya know, he's doing it for me.*

Weinberg: *I know that.*

> Errichetti: *He don't give a fuck about no ten thousand dollars.*[177]
>
> Errichetti: No, believe it when I tell you: MacDonald, MacDonald isn't getting a fucking quarter. No way. I may buy him a cigar, a three dollar cigar, that's it, but there ain't no fucking way I'm gonna offer, give him the money. And there's no way that fucking MacDon . . . McCloud is gonna say he's gonna give it to him. The deal's off. [Laugh.]
>
> Weinberg: Well, we'll work on that. We'll hold that in abeyance. We'll work on that.
>
> DeVito: Well, its a good thing we know, we knew. . . .
>
> Weinberg: We know, because we didn't know which way to go because he came back, you know he's riding on cloud ninety-nine. ([Deleted] *reprinted in* 128 Cong. Rec. S 1500-06 (daily ed., Mar. 3, 1982).)

Errichetti complained about McCloud's desire to deal directly with MacDonald, rather than through him, the bagman. He said that McCloud would risk antagonizing MacDonald. (*Id.*)

Plaza claimed that the March 8, 1979, tape was clear evidence that Errichetti and Weinberg were duping MacDonald and McCloud. (House Jud. Subcomm. Hrg., June 2, 1982, at 14 (testimony of Edward J. Plaza).) The Select Committee disagrees. The Select Committee concludes that when Weinberg said "the balance we'll glom." he was not planning, at that point, to share in the MacDonald bribe. Amoroso was present at the time, and there is no evidence that Amoroso was ever part of any bribe-sharing scheme.[178] Moreover, Weinberg knew the meeting was being taped and would not have been foolish enough to record and give to the FBI a tape of a conversation describing his plan to share the bribe. When the Select Committee pointed this out to Plaza, he had no coherent response. (Sel. Comm. interview of Edward J. Plaza, July 14, 1982.)

The Select Committee concludes that on March 8 Weinberg was again attempting to pierce Errichetti's bagman shell. In order to get MacDonald to appear in person and to commit himself on video tape, he was making promises and assurances that neither he nor any of the government agents was prepared to keep.[179]

On March 20, 1979, the government obtained even more corroborating information that MacDonald was corrupt. Errichetti's nephew, Joseph DiLorenzo, was in Florida helping to prepare for a party in Errichetti's honor that was being held on March 23, 1979, on the FBI's yacht, *The Left Hand*. While in Florida, DiLorenzo boasted about his uncle to Gunnar Anderson (Special Agent Gunnar Askeland). He told Anderson that Errichetti "owned" MacDonald; that Errichetti got MacDonald his position on the Casino

---

[177] The italicized language did not appear in the FBI's transcript of this conversation. It was not even marked inaudible; it was merely ignored. Irrespective of the Select Committee's conclusions about MacDonald, this was an inexcusable transcription omission.

[178] The Select Committee concludes that at some point Weinberg and Errichetti did conspire to share in the MacDonald money, (*See* pp. 138-39 *supra.*) It does not think that Weinberg ever recorded these plans, or ever discussed them in front of Amoroso.

[179] The Select Committee reaches a similar conclusion regarding another conversation between Weinberg and Errichetti on March 8, 1979, concerning Edward Ellis. (*See* pp. 294-96 *infra.*)

Control Commission; that MacDonald owed Errichetti many favors and had begun paying them off by saving Resorts International's casino license; and that MacDonald could be counted upon for future favors. ([Deleted]) DiLorenzo confirmed on June 10, 1980, that he had made these statements. He said that he had been trying to impress Askeland (whom he remembered only as Gunnar) with Errichetti's importance. (Martin F. Houlihan FD 302, June 10, 1980.)

Errichetti himself went to Florida on March 22, 1979. He met that evening with Weinberg and DeVito. Weinberg asked whether MacDonald had not gone to the party because he was angry. Errichetti said MacDonald was not angry, but that he, Errichetti, was upset with McCloud for not having followed up on the March 5 meeting with MacDonald. ([Deleted])

The next day DeVito, Weinberg, and Errichetti again discussed MacDonald. Weinberg said that MacDonald was going to guarantee a casino license for Abdul and was going to become a business partner with DeVito, Weinberg, and Errichetti in future real estate deals. ([Deleted]) Thus, the bribe being offered to MacDonald now included not only cash, but future lucrative transactions. Errichetti stressed that MacDonald was the key man in regard to the casino license because the other commissioners depended on his judgment. Errichetti referred to MacDonald as "our man." ([Deleted]) He said that Commissioner [deleted] was independent, but that through MacDonald he, Errichetti, controlled the other four. Errichetti also claimed that MacDonald had been instrumental in saving the casino license for Resorts International. ([Deleted])

Weinberg then suggested that Errichetti meet with McCloud to work out their differences. ([Deleted]) Weinberg told Errichetti that McCloud thought he needed MacDonald; McCloud was buying a friend. Errichetti complained that McCloud had already bought a friend—Errichetti. He also said that MacDonald could not get involved for six years. Weinberg said McCloud wanted double insurance.[180] ([Deleted])

McCloud and Errichetti did meet on March 23. The meeting was characterized by an undertone of hostility on Errichetti's part. McCloud told Errichetti that, even though he trusted him, he had to know personally that MacDonald was getting the money. Errichetti resisted, but finally proposed a compromise plan: McCloud would give Errichetti the envelope, and Errichetti then would hand MacDonald the envelope in the parking lot while McCloud watched from his window. Because he was upset at McCloud's requiring MacDonald's presence, Errichetti raised the amount of the bribe:

> ERRICHETTI: O.K., what's the number?
>
> McCLOUD: What do you want?
>
> ERRICHETTI: As much as you can give. You looking for a gangster you're gonna fucking get it.
>
> McCLOUD: Well, you tell me.

---

[180] Plaza claimed that the March 23 tape, a transcript of which he had not seen until February 1981, was a key transcript in helping to prove his concern that MacDonald had been duped. He was very upset that he had not seen it until so late. (Sel. Comm. Hrg., July 28, 1982, at 31 (testimony of Edward J. Plaza).) The Select Committee agrees with Plaza's concerns over the FBI's lax transcribing practices (*see* pp. 96–99 *supra*), but does not agree that this tape was crucial; nor does it agree that it is evidence that MacDonald was duped.

> ERRICHETTI: Let's give him the hundred (inaudible). Stop all the fucking bullshit. I'll come to your office. He'll be out in the car or wherever, parking lot. I'll have Joey there, naturally, because he drives. When I go downstairs, I will stand out in the fucking I mean by the car; and I'll talk to him and I will hand the fucking envelope, period. That satisfactory?
>
> McCLOUD: O.K.
>
> ERRICHETTI: Be done. When you wanna do it?
>
> McCLOUD: Tell me. ([Deleted])

The next day, March 24, 1979, Weinberg convinced Errichetti that MacDonald actually would have to appear in the room when Errichetti picked up the payment:

> WEINBERG: The only other thing, Ange, you know I was thinking. You said he was gonna sit in the car. Why don't you bring him up and put him in one of the offices when you go in with Jack. I don't think . . . (inaudible)
>
> ERRICHETTI: I said to Jack. I said I was thinking about a, a strategy. I can't see him in the fucking parking lot sitting like a (inaudible).
>
> DEVITO: (inaudible) I agree with you.
>
> WEINBERG: Alright.
>
> ERRICHETTI: I've gotta think of something to bring him up in the building, sit down . . . (inaudible)
>
> WEINBERG: Let him sit in the office and . . .
>
> DEVITO: Maybe, he's got that other office. Let him sit in the other office.
>
> WEINBERG: Yeah.
>
> DEVITO: Ya know, the one next to Jack's.
>
> WEINBERG: Go in and say hello to Jack and walk. Alright? And then we'll meet you Saturday night. . . . (House Jud. Subcomm. Hrg., Sept. 13, 1982 (written statement of Justin P. Walder, Ex. H).)

On the basis of the foregoing evidence, the FBI, with the concurrence of the Department of Justice, approved a payment of $100,000 to MacDonald to be made on March 31, 1979. The Select Committee concludes that the decision was reasonable. The government had numerous articulable facts to support a reasonable suspicion that MacDonald was corrupt and that he would take a bribe.

At the same time, the Select Committee recognizes that on several occasions, Errichetti had indicated that MacDonald expected no money for his actions and that Errichetti would give him none. These protestations were of two kinds. At times, Errichetti tried to isolate MacDonald: no one was going to meet with MacDonald, and if anyone did meet with him, there was to be no mention of casino licenses or money. The government was entitled to discount these protestations as the normal and expected actions of a bagman. At other times, however, Errichetti admitted that MacDonald would violate his oath and help Abdul Enterprises get a license unfairly, but would not get paid. These statements did not detract from the government's reasonable suspicion that MacDonald was corrupt, but they should have made the government take great care to ensure that Errichetti actually delivered the money to MacDonald.

2. Ambiguities in the March 31, 1979, Transaction

Even though the Select Committee concludes that the government had a reasonable suspicion that MacDonald was corrupt and was willing to take a bribe, the Select Committee is deeply troubled by the manner in which the opportunity to commit a crime was executed. As the result of flawed communications from the FBI field office to FBI headquarters, from FBI headquarters back to the field, from Department of Justice attorneys to FBI headquarters, and from strike force attorneys to FBI special agents, the meeting on March 31, 1979, contained numerous needless ambiguities. The need for a clear acknowledgment by MacDonald was of greater importance than usual in this case because of the indications that Errichetti might not pay him.

On March 26, 1979, the FBI New York Field Office requested FBI HQ approval of a $100,000 payment to MacDonald. Errichetti had been maintaining for months that he was the "bag guy" who would accept the money. Eventually, however, the FBI, in part through Weinberg, convinced Errichetti to produce MacDonald personally. The approval request included the scenario that had been agreed upon. It said, "The Mayor will personally accept the money and turn it over to MacDonald in the presence of undercover special agents." ([Deleted]) The document stated that Puccio and Jacobs had approved the payoff and that full return of the monies paid was contemplated.

On March 30, 1979, FBI HQ approved the expenditure of $100,000. The approval stated, "The Director has instructed that the $100,000 should be delivered only to Kenneth MacDonald, New Jersey Gaming Control Commission Vice Chairman. Insure that statements from MacDonald are elicited regarding assurance of casino license prior to providing payment." Because the only individuals who were to attend the meeting were Special Agent McCarthy, acting as McCloud, Errichetti, and MacDonald, and because McCarthy would be handing over the money, the *only* rational interpretation of the Director's requirement—"the $100,000 should be delivered only to Kenneth MacDonald"—was that the money could not go to Errichetti. (Even if Weinberg were to attend the meeting, McCarthy obviously would not hand the money to him, the FBI informant, in order to establish a criminal act by MacDonald.)

MacDonald and Errichetti met with McCloud (Special Agent McCarthy) on March 31, 1979, at Abdul Enterprises' offices. ([Deleted]) Prior to Errichetti and MacDonald's arrival, McCloud placed $100,000 in a briefcase and placed it on a desk in his office. McCloud and Errichetti first met alone for a few minutes. Errichetti entered with a briefcase that he placed on an empty chair. Errichetti mentioned the phrase "key to our future" three times and described how the payoff was to be handled. ([Deleted]) MacDonald then joined them. For the next few minutes, they discussed an article about Errichetti that had appeared in the *New York Times* and various business matters concerning Camden. ([Deleted])

Suddenly, in a manner that has to be seen on the video tape to be appreciated for its bizarreness, after a discussion about Long

Island, and for no apparent reason, MacDonald literally rushed to the window, pried an opening in the venetian blinds, and stared intently outside. In his dash, he ran into the chair with the briefcase on it and pushed it out of the way. Errichetti calmly picked up the briefcase and sauntered over to the desk where McCloud was standing, and began the following sequence:

> ERRICHETTI: You're in great shape, my friend. Alright, I've come up for the money for the future, my boy.
>
> McCLOUD: O.K., I tell you, you know, we're making a big investment in Atlantic City.
>
> [McCloud moves and blocks camera. MacDonald is obscured.]
>
> ERRICHETTI: No question about it.
>
> McCLOUD: And I'm sure . . .
>
> ERRICHETTI: Everything will be (inaudible).
>
> McCLOUD: Won't be any problem at all.
>
> ERRICHETTI: None whatsoever. That's for me to take [referring to McCloud's briefcase].
>
> McCLOUD: You can take the whole thing [opens briefcase wide, displaying money].
>
> ERRICHETTI: O.K. I'll take that and I'll leave you this [referring to the two cases].
>
> MACDONALD: What are you building, industrial parks here? [MacDonald still cannot be seen.]
>
> McCLOUD: Huh, Ken?
>
> MACDONALD: Industrial parks?
>
> McCLOUD: Yeah. I hope that, Ken, I hope there won't be any problem with our . . . [opens briefcase again].
>
> ERRICHETTI: No, there won't be any problems.
>
> McCLOUD: Licensing or anything else in uh Atlantic City as a result of this.
>
> * * * * * * *
>
> McCLOUD: As long as we have no problems at all with the licensing as you say, cause I say that's my biggest problem and without that I have nothing in Atlantic City.
>
> ERRICHETTI: Without a license and casino, you know what you got?
>
> McCLOUD: I have a pile of dirt. Well, I have a hotel, but again, I have a pile of dirt unless I get that casino license. That is the most important thing.
>
> ERRICHETTI: That's the ballgame.
>
> McCLOUD: Because that's where the money is to be made and that's why we're all here. ([Deleted])

As MacDonald and Errichetti were leaving, McCloud thanked MacDonald and asked whether there would be any problems. MacDonald, who seemed very subdued, mumbled an answer that the FBI transcribed as, "You're right way up." ([Deleted]) All three then left the office.

McCloud and Errichetti then reentered the room. They discussed how the earlier meeting had gone. Errichetti was somewhat sullen, but said that there were no problems and that he was happy. ([Deleted])

The Director's directive undeniably was not literally obeyed. The $100,000 was not "delivered only" to MacDonald. It was delivered to Errichetti in MacDonald's presence. Also, MacDonald gave no clear and unambiguous assurances about Abdul's casino license. Indeed, he gave no assurance at all. The meeting did not even fulfill the assurances that had been predicted in the March 26 request for approval: Errichetti did not deliver the money to MacDonald in the presence of any undercover agent, if he did it at all.

The Select Committee attempted to discover what the Director had meant and what had created the communications breakdown. FBI Director William H. Webster testified that his major concern had been to communicate that the traditional bagman approach would be unacceptable. He was concerned that the suspect be present, demonstrate a knowledge of why he was present, and make the requisite representations. He testified that his note had meant that MacDonald had to be present when the money was passed, but that he had not focused on whether MacDonald took actual physical possession of the money or merely took constructive possession. (Sel. Comm. Hrg., Sept. 30, 1982, at 76–77 (testimony of William H. Webster).)

The Director testified that he could remember few of the details of the MacDonald case, but, on the basis of his contemporaneous notes, he said that he had known at the time the request for approval was made that Errichetti already had received a payment that had established a prosecutable case against him. (*Id.* at 71.) Director Webster also was aware that there had been resistance to having MacDonald appear at any transfer of funds and that Errichetti had preferred to play the traditional "bagman" role. (*Id.*) Director Webster had talked to Puccio who, according to Director Webster's notes, had told him that Errichetti had been told that assurances from MacDonald would be required before money was paid. Puccio also had said that the assurances would be captured and that he did not anticipate any entrapment problem.

Puccio testified before the Select Committee that he believed that the MacDonald transaction had been clear and unambiguous. He said that one could conclude from viewing the video tape that MacDonald had seen the money.[181] Puccio also said that what one could see on the video tapes was unimportant, because, when MacDonald had been interviewed by the FBI in 1980, MacDonald had admitted having seen the money. (Sel. Comm. Hrg., July 27, 1982, at 113–14 (testimony of Thomas Puccio).)

Puccio claimed not to have seen Director Webster's authorization document until two years after it had been written. In Puccio's view the agents had complied with the directive: MacDonald had been paid directly.

He further testified, however, that he had not been concerned with the FBI's internal rules. The only directive of Director Webster's that had any legal significance was that the transaction be clear. According to Puccio, it had been clear. It had made no difference whether Errichetti or MacDonald actually had taken possession of the money. Puccio said that he had talked to the Director prior to the March 31 meeting and that they had discussed the scenario. He said that Director Webster's primary concern had been that the transaction be clear. Puccio had no idea why the directive had not been followed more literally. (*Id.* at 116–17.)

---

[181] Puccio is absolutely wrong on this point. MacDonald is totally obscured from view. It is impossible to determine, just from the tape, what he might have seen.

John Jacobs was the attorney from Puccio's office who monitored the meeting. He did so aurally from a connection in the Hauppauge Resident Agency, 15 or 20 minutes from the Abdul Enterprises business office, where the meeting actually took place. Jacobs testified before the Select Committee that he had been unaware of the Director's teletype prior to the meeting; Good had never informed him of it. He said that he had been in the room when Puccio and Webster had spoken by telephone on March 29. After that call, Puccio had not told him that the money had to be paid only to MacDonald. (Sel. Comm. Hrg., July 29, 1982, at 12–15 (testimony of John A. Jacobs).)

Jacobs testified that he does not think "directly" necessarily means "physically." He thought the Director's authorization meant that the payment had to be made openly in the politician's presence. He admitted, however, that he had been unaware of Webster's instructions and that he would have sought clarification if he had seen them. (*Id.* at 61–63.)

Special Agent McCarthy, who actually conducted the March 31, 1979, meeting told the Select Committee that he had not been aware of Director Webster's handwritten note prior to the meeting, although he did see the teletype sometime afterwards. McCarthy said that he had received explicit instructions from Jacobs that he be forceful, specific, and graphic. He had been told that he had to show the money to MacDonald, that MacDonald had to be in the room when the money was passed, and that MacDonald had to know exactly why he was present. McCarthy said that he had followed his instructions: He had shown the money to MacDonald, and MacDonald had looked right at it. (Sel. Comm. interview of John M. McCarthy, Sept. 2, 1982.)

Supervisor Good told the Select Committee that the original plan had been that MacDonald would remain in the car while Errichetti received the money. Good then had told McCarthy that MacDonald actually had to see the money. He claimed that McCarthy had shown MacDonald the money.[182] (Sel. Comm. interview of John Good, July 13, 1982.) Good testified before the Select Committee that he made the ultimate decision on whether to allow a payment to be made, and that such decisions had been left to those in the field. (Sel. Comm. Hrg., July 27, 1982, at 125–26 (testimony of John Good).) Good was not, however, speaking specifically about the MacDonald meeting.[183] He has never explained why he failed to communicate the Director's instructions to Jacobs or to McCarthy.

The Select Committee concludes that the video tape of the March 31, 1979, meeting contains needless ambiguities. They were caused in part by Special Agent McCarthy's unfortunate blockage of the camera, an incident that rather clearly manifested the absence of prior dress rehearsals. It is impossible to determine what MacDonald saw or how he reacted. Part of the problem, however, lies in the faulty communications within the FBI and between the FBI and the Department of Justice.

---

[182] Good, however, could not have had first-hand knowledge, because he monitored the meeting aurally from another location, and the video tape does not show that MacDonald saw the money.

[183] Good was answering in terms of the alleged ambiguities in the payment to Representative Thompson on October 9, 1979. For a full discussion of the Thompson case, see pp. 267–77 *infra*.

The Select Committee's initial interpretation of the statement that "the $100,000 should be delivered only to Kenneth MacDonald" was that MacDonald should have physically received the money. The Select Committee continues to find that interpretation to be the only reasonable objective one, given the language itself, given that the only individuals at the meeting were an FBI agent, MacDonald, and one other person, and given that Director Webster issued that order after having been shown a request for approval stating that the money would be given to Errichetti and that Errichetti would give it to MacDonald in the presence of the undercover agent. The Select Committee accepts Director Webster's statement that he had not intended his directive to be so restrictive, but the Select Committee also notes that the Director himself stated that any agent who had any doubts as to what was meant should have had the meaning clarified. (Sel. Comm. Hrg., Sept. 30, 1982, at 75 (testimony of William H. Webster).) Anyone who read the Director's note and who wanted not to hand the $100,000 to MacDonald *had* to have had doubts about whether the note would permit such conduct, but no one sought clarification.

The Select Committee is especially troubled that both John Jacobs and John McCarthy claim never to have been informed of the Director's instruction.[184] If the Director of the FBI has issued specific orders about how a transaction is to be handled, the operatives in the field obviously should be informed. Similarly, representatives of the Department of Justice, especially those monitoring videotaping sessions, should be apprised of particular instructions from high-level officials of the FBI.

The Select Committee does not conclude that middlemen should never be allowed to take constructive possession of a payoff.[185] In the MacDonald case, however, there were several reasons, detailed above, why the meeting should have been more clear.[186]

3. MacDonald's Awareness of the Purpose of the March 31 Meeting

Regardless of the ambiguities in the video tape of March 31, 1979, the Select Committee concludes, on the basis of the preponderance of the evidence, that MacDonald was aware that $100,000 was being paid to Errichetti and was aware that his, MacDonald's, presence made the payment possible. The conclusion is based on the inconsistent stories of Errichetti and MacDonald, on the inherent improbability of those stories, on the video tape of the March 31 meeting, and on an audio tape of a subsequent meeting that day among MacDonald, Errichetti, Weinberg, and DeVito.

---

[184] This failure reflects particularly poorly on John Good, who had the responsibility to communicate instructions from headquarters to the field.

[185] *See* pp. 265–67, *infra*.

[186] The Select Committee recognizes, and does not wish to appear critical in that recognition, that Special Agent McCarthy was not an experienced undercover agent. The other undercover operatives received feedback from both MacDonald and Errichetti that they were offended by his manner during the meeting. The undercover agent is in an exceptionally difficult position. He must be explicit enough to avoid ambiguities, yet he must also be subtle enough to avoid offending the suspects and arousing their suspicion.

The Select Committee recognizes that there is evidence that MacDonald never received any part of the $100,000. The Select Committee concludes elsewhere in this report that Weinberg and Errichetti shared some portion of the $100,000.[187] In addition, when the FBI later recovered $25,000 of the payment, MacDonald's fingerprints could not be found on any of the bills. This evidence, however, undercuts neither the Select Committee's conclusion that MacDonald was a willing participant in a bribe nor its conclusion that the government had sufficient evidence to seek in good faith to indict MacDonald. It is, rather, a glaring example of the FBI's inadequate supervision over Weinberg.

Errichetti's account of why MacDonald was willing to appear with him at Abdul Enterprises on March 31 is totally unpersuasive. Errichetti testified before the Select Committee that he and Weinberg had been planning on defrauding Weinberg's supposed employer almost from the first moment the two men had met. He said that he had been lying, on Weinberg's instruction, when he had told McCloud on January 9 that MacDonald would take a kickback. (Sel. Comm. Hrg., Sept. 15, 1982, at 40–42 (testimony of Angelo J. Errichetti).)[188]

Errichetti testified that, as the months progressed, he and Weinberg had conceived of numerous arrangements to make it appear that MacDonald was receiving money. Errichetti said that he never had anticipated actually approaching MacDonald with a corrupt offer. Errichetti said that he and Weinberg finally had devised a plan that had worked. Errichetti said he had convinced MacDonald to plan to enter business with himself, Weinberg, DeVito (Amoroso), and MacDonald's son. According to Errichetti, he had convinced MacDonald to accompany him to the Abdul Enterprises business offices, where he, Errichetti, was to have received a commission for some unspecified prior transaction. He and MacDonald had planned then to meet with DeVito and Weinberg and to discuss the future corporation. Errichetti claimed that the money that he was to receive was to be placed in an escrow account for use of the future corporation when he and MacDonald had retired. (*Id.* at 113–19.)

Errichetti offered no reasonable explanation for why MacDonald had had to watch him receive money from a previous transaction. Nor could Errichetti recall how he had convinced MacDonald to drive for a total of five or six hours to go to a room to watch, and to be seen watching, Errichetti receive a huge cash payment, for some unspecified prior transaction, from a person with whom MacDonald had dined earlier that month, who MacDonald believed to be a prospective applicant for a casino license, and with whom MacDonald had discussed casino licensing procedures. Errichetti simply told the Select Committee that he had been "persuasive." He had convinced MacDonald to spend the whole day with him. In the morning they had gone to the dedication of a new hospital where Errichetti had given a speech. Afterwards, MacDonald had agreed to ride several hours with Errichetti and watch him receive money so that they could "chat." (*Id.* at 122–23.)

---

[187] *See* pp. 138–49 *supra*.

[188] As explained elsewhere in this report, the Select Committee disbelieves Errichetti's allegation that Weinberg had convinced him in early 1979 to pretend to be corrupt. In particular, the evidence is overwhelming that Errichetti went to his first meeting with Abdul Enterprises on December 1, 1978, with specific plans for corrupt casino license deals and did not meet with Weinberg, as Errichetti has alleged he did, on January 6, 1979. *See* pp. 408–09 *infra*.

Errichetti testified that MacDonald had known they were going to visit McCloud, but had never expressed any concern over the apparent impropriety of MacDonald's being in a room in which a potential casino license applicant, with whom he had socialized earlier, passed money. Errichetti said that he had been surprised that MacDonald had not mentioned anything about it. (*Id.* at 126.)

Errichetti testified that he and MacDonald had no prearranged signal about the delivery of the money and that he had no explanation for why MacDonald had abruptly scurried to the window, other than possible fear of how compromising the meeting appeared. He said that MacDonald had become very angry and upset over the manner in which McCloud had conducted himself. Errichetti said that both he and later DeVito and Weinberg had apologized for McCloud's action.[189]

According to lawyers in the Department of Justice who investigated the MacDonald case, MacDonald had told them, contrary to Errichetti's testimony, that he had not known where he was going when he had accompanied Errichetti. He had said that he had been shocked when he had seen McCloud. He claimed to have recognized immediately the compromising nature of his situation.

Both men's accounts are belied by the video tape of the March 31 meeting and by the audio tapes of the subsequent meeting with Weinberg and DeVito. It appears clear to the Select Committee that MacDonald and Errichetti had prearranged a signal for when the money was to be passed. MacDonald's sudden dash to the window was not a casual stroll made out of curiosity as to what was happening in the parking lot. Immediately after MacDonald did all that he could to absent himself from proximity to the cash while still staying in the room, Errichetti said, "I've come for the money for the future." This was virtually the same phrase that Errichetti had used previously to describe MacDonald.[190]

The Select Committee concludes that Errichetti and MacDonald had prearranged a way for MacDonald to be insulated as much as possible. As has been discussed, Errichetti had referred to himself as MacDonald's "bag guy" and had resisted having MacDonald appear in person. Once it had become evident that MacDonald had to be present at the payoff, they had arranged for MacDonald to be looking out the window when the money was passed.

The above scenario also best describes why MacDonald was so upset. The Select Committee disbelieves that MacDonald did not know he was meeting McCloud. First, he was extemely cordial when he first arrived. He manifested absolutely none of the shock he later told the FBI he had experienced upon seeing McCloud. He became upset only after the money had been passed in an open manner. Second, he already had planned to meet with other representatives of Abdul Enterprises, a fact that shows that the meeting with McCloud on March 5 was not expected to be MacDonald's last contact with Abdul Enterprises and that MacDonald was willing to discuss, with representatives of the potential casino applicant, his own vocational, and, hence, financial, future.[191]

---

[189] DiLorenzo told the FBI on June 10, 1980, that his uncle had told him on March 30 that they were going to go to Long Island on March 31, 1979. First, they were going to see if MacDonald wanted to go along. DiLorenzo thought that he and Errichetti would have gone without MacDonald. After the meeting at Abdul Enterprises, Errichetti had given him a briefcase. DiLorenzo said that MacDonald had been very angry and upset. Errichetti, Weinberg, and DeVito had all apologized to MacDonald. (Martin F. Houlihan FD 302, June 10, 1980.)

[190] *See, e.g.*, ([Deleted])

The meeting at the coffee shop at the Hauppauge Holiday Inn among Errichetti, MacDonald, Weinberg, and DeVito reinforces the Select Committee's conclusion. Weinberg apologized for McCloud's actions:

> MACDONALD: Just worried (inaudible) fucking (inaudible) this morning (inaudible) negotiable, a little bit shaky himself in his attitude. (inaudible) seemed like entrapment.
>
> WEINBERG: I apologize for it. He's a nervous fellow.
>
> MACDONALD: He didn't (inaudible) good judgment here (inaudible).
>
> WEINBERG: He's got a lot of problems.
>
> MACDONALD: I really don't care what lump. I'm not gonna be greedy.
>
> WEINBERG: No, don't worry about it. It won't happen again.
>
> MACDONALD: Well, I also. ([Deleted])

Much of the rest of the meeting that is audible on the recording is spent discussing MacDonald's future, including jobs for his son and son-in-law. ([Deleted])

On the basis of the above discussion, the Select Committee concludes that Errichetti was partially accurate in his testimony before the Select Committee. There is persuasive evidence that, as Errichetti testified, MacDonald was planning to join forces with Weinberg and Errichetti after his term on the Casino Control Commission expired. On March 27 Errichetti and Weinberg had made arrangements for a meeting with MacDonald on March 31 to "talk about his future." ([Deleted])

In this vein, a seriously damaging piece of evidence undermining the contention that MacDonald did not think he was being bribed on March 31 is Errichetti's testimony that he, Errichetti, had convinced MacDonald to agree to enter into a business in the future with Errichetti, Weinberg, DeVito, and MacDonald's son. If MacDonald agreed to attend the March 31 meeting in order to ensure a future job for himself and his family, knowing that the only conceivable reason for his presence at the meeting was his position on the Casino Control Commission, he was there to participate in a bribe. Whether his payoff was cash, an investment, a future job, a job for his son, a job for his son-in-law, or a combination of several of those benefits, his payoff was nonetheless corrupt.

There is inconclusive evidence as to MacDonald's having received any money. As discussed at pages 138–49 *supra*, the Select Committee concludes that Weinberg and Errichetti had arranged to split at least some of the $100,000. On March 30, 1979, Weinberg and Errichetti met in a lengthy unrecorded meeting. On March 31, Weinberg and Errichetti made arrangements to meet the next day. On April 1, the Select Committee has concluded, Weinberg and Errichetti met and shared some of the $100,000.[192]

---

[191] In talking with Errichetti on March 23, 1979, Weinberg had arranged to meet with MacDonald, after MacDonald again met with McCloud, to discuss MacDonald's future. ([Deleted])

The FBI arranged to recover $25,000 of the $100,000 payment on the pretext that DeVito needed the money to repair the yacht, which had been damaged in a fire. The story was that otherwise he was in danger of losing his job. Errichetti, therefore, had DiLorenzo deliver $25,000 to Bruce Bradley (Special Agent Bruce Brady) on April 3, 1979. When the FBI later conducted a fingerprint analysis of the money, the bills were clean of MacDonald's fingerprints. This is hardly conclusive evidence, however, that MacDonald received no money. Errichetti had been in possession of the briefcase after the payoff. Since he was in charge of dividing the money (if in fact he did divide it with MacDonald), there would have been no reason for MacDonald to have handled bills that were being kicked back to Amoroso.[193]

Even if MacDonald had not received any money, the government still would have had a basis for seeking to indict. Weinberg and Errichetti's sharing of some or all of the $100,000 does not negate MacDonald's responsibility for the transfer of the funds. His presence had been the cause of the transfer of money, and he was aware of that fact.

4. Prosecution of MacDonald by the Department of Justice

The Select Committee concludes that the Department of Justice was justified in prosecuting MacDonald and did not do so out of bad faith. Contrary to allegations by Walder, Plaza, and Weir, the government did not deliberately ignore allegedly exculpatory material provided by MacDonald, nor did it move the grand jury improperly.

The MacDonald case was originally assigned to Plaza and Weir. Because of their concerns with the propriety of the Abscam investigation and their failure to start an *investigative* grand jury, they were removed from the case in June 1980.[194] The Select Committee concludes that Nathan did not order Plaza or Weir to indict MacDonald.

Attorneys Reid Weingarten and Eric Holder were then assigned to the investigation. They uncovered many facts that troubled them about the case, the most important of which was the evidence that Weinberg had shared in the March 31, 1979, bribe.

---

[192] *See* pp. 138-49 *supra*. The Select Committee's conclusion is based largely on evidence that Weinberg deliberately phonied the time on a tape recording to make it appear as if he were talking on the telephone at the time the Select Committee concludes he was actually meeting Errichetti. Although the Select Committee concludes that the FBI was lax in monitoring Weinberg, it disagrees strongly with a statement made by Walder. Walder criticized Amoroso for having gone to Canada on April 1, when he was supposed to be supervising Weinberg. Walder's statement is unfounded and unfair. First, Amoroso was never ordered to supervise Weinberg every minute of every day. Second, and most imortant, Amoroso was not off on a frolic. He traveled to Canada to testify in another proceeding unrelated to Abscam. He was fulfilling his obligations as a special agent, and he acted totally professionally in so doing.

[193] One conclusion that can be reached from the lack of MacDonald's fingerprints on the $25,000 is further proof that Errichetti lied on an April 1, 1979, tape. In that tape, which was the one the Select Committee has concluded was prearranged by Weinberg and Errichetti, Errichetti claimed that MacDonald, having heard of DeVito's plight, took $25,000 and gave it to Errichetti.

[194] Plaza's explanation for why he stopped working on the case differs from Irvin B. Nathan's and Philip B. Heymann's. Plaza emphasizes that he previously had asked to be removed from the case. The Select Committee notes that Plaza had, in fact, earlier requested to be removed from Abscam, but no such action had occurred at that time. When Nathan and Heymann did decide to remove him, it was because of his failure to convene an investigative grand jury.

Weingarten and Holder wanted MacDonald to submit to a polygraph. Their supervisor, Gerald McDowell, turned down the request. (Sel. Comm. interview of Reid Weingarten, Sept. 3, 1982.) The Select Committee finds nothing to criticize in McDowell's decision. Polygraphs are unreliable, and many prosecutors, including McDowell, virtually never use them.

Weingarten informed the Select Committee that he wrote the prosecution memorandum on the MacDonald case, even though he had some doubts. He had no question that there had been probable cause to indict. He categorically denied that, as some have alleged, he resigned from or had been removed from the case; rather, he and his superiors had come to a mutual agreement that he would not prosecute, because he had some reservations and preferred not to try the case.

On March 5, 1981, the Department of Justice appeared before United States District Judge H. Curtis Meanor to request that the MacDonald investigation be transferred from New Jersey to New York. (*See* 128 Cong. Rec. S 1520–25 (daily ed. Mar. 3, 1982).) Supporters of MacDonald allege an improper motivation for this move. They allege that the government was aware that the New Jersey grand jury would not have indicted, because of the information about Weinberg's alleged bribe-sharing. The Department of Justice, therefore, supposedly moved the grand jury to a more hospitable district.

The Select Committee concludes that the Department of Justice had several legitimate reasons for wanting the grand jury in New York. Those reasons included: (1) venue was natural in New York, since the March 31, 1979, payoff had taken place there; (2) it made sense to try most of the Abscam cases centrally; (3) the original assignment of the MacDonald case had been a part of a larger investigation of corrupt practices in Atlantic City, but no other case had been developed; (4) Judge Pratt already had heard much of the relevant material, and (5) it would have been difficult to have tried a case in New Jersey given Plaza and Weir's unrelenting enmity to Abscam. When the reasons were explained to the New Jersey grand jury, it voted to relinquish control of the investigation.[195]

D. ALLEGATIONS THAT VIDEOTAPED MEETINGS WITH REPRESENTATIVES THOMPSON AND MURPHY WERE DELIBERATELY AMBIGUOUS

1. Defendants' Allegations

Former Representatives Frank Thompson, Jr., and John M. Murphy allege that the government either deliberately created ambiguities in their videotaped meetings with Abscam operatives or were reckless in allowing the ambiguities to occur. (*See Murphy* Def. Appellate Brief 39–50.) The meetings in question are the two in Washington, D.C., with Representative Thompson, Criden, DeVito

---

[195] The Department of Justice did not indict every Abscam suspect. In cases where it felt that a case could not be proven, it did not indict. The case of [deleted] State Senator [deleted] is the clearest example.

(Special Agent Amoroso), and Weinberg on October 9, 1979,[196] and the one in New York with Representative Murphy, DeVito, Weinberg, and Criden on October 20, 1979.

Thompson and Murphy alleged at trial that they had been unaware of the true purpose of their respective meetings with the representatives of the sheiks when they had arrived and had been no wiser when they had left. In both the October 9 meetings with Thompson and the October 20 meeting with Murphy, Criden left in custody of the briefcase containing $50,000. At the meetings, neither Representative was shown any money or told how much money was being offered for immigration assistance to the sheiks. Thompson and Murphy alleged that Criden had deceived them and had pocketed the entire $50,000 from each meeting. They also alleged that, by promises of legitimate investment in their respective congressional districts, Criden had duped them into appearing before the FBI's cameras and that the promises had been confirmed by DeVito and Weinberg during the respective meetings.

After having been convicted by the jury, Thompson and Murphy made an additional, but related, argument to Judge George C. Pratt in post-trial motions to dismiss.[197] They argued that, because the government agents had been in total control of the videotaping, those agents had had an obligation to minimize any ambiguities. They alleged that the government had deliberately created in the video tape record ambiguities that then had misled the jury into believing that the defendants had been aware of the purposes of their respective meetings.

Murphy cited as support for this argument statements made by FBI Director William H. Webster and by then Assistant Attorney General Philip B. Heymann before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on March 4, 1980. Heymann testified that one of the important safeguards in an undercover operation dependent upon the use of unwitting middlemen was "making clear and unambiguous to all concerned the illegal nature of any opportunity used as a decoy." (FBI Undercover Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 139 (1980) (testimony of Philip B. Heymann); *Myers* D.P. Ex. 110.)

Murphy further alleged that, because of the deliberate ambiguities, he had been improperly denied the opportunity to say "no" to a bribe offer. (*See Murphy* Def. Appellate Brief 49–50.) He cited the Abscam decision by the Second Circuit Court of Appeals refusing to dismiss Representative Myers' indictment prior to his trial. In that opinion the court had discounted the possibility that Congressmen would be intimidated by undercover investigations like Abscam, saying: "Any Member of Congress approached by agents conducting a bribery sting operation can simply say 'no.' " (*United States* v. *Myers,* 635 F.2d 932, 939 (2d Cir. 1980).) Thus, Thompson and Murphy claim that the government's failure to afford them a clear and unambiguous chance to deny a bribe offer violated both due process and the integrity of the truth-seeking process.

---

[196] Thompson was not charged with a crime as a result of the October 9, 1979, meetings. He was convicted of bribery in connection with the October 20 session with Murphy. Nevertheless, he used the October 9 meeting as a basis for arguing both due process outrageousness and his ignorance of the true import of the October 20, 1979, Murphy meeting. The government relied on the videtape of the October 9 session as background to establish Thompson's actions regarding October 20. The ambiguities in that meeting were at issue during trial. The Select Committee is concerned, therefore, with any allegation of government impropriety arising out of those meetings.

[197] Murphy also raised the argument to the Second Circuit Court of Appeals on appeal of Judge Pratt's denial of his post-trial motions.

2. Judicial Decisions Regarding Defendants' Allegations of Deliberate Ambiguity

In ruling on the defendants' contentions (1) that Murphy had not known what was in the briefcase that Criden accepted on October 20, 1979, (2) that Murphy never had received any of the proceeds, (3) that Thompson had not known that the Murphy meeting on October 20, 1979, would result in any payment to either Criden or Murphy, and (4) that Thompson never had received any of the proceeds, Judge Pratt stated that the contentions:

> [W]ere rejected by the jury, which found each defendant guilty on some counts, and not guilty on others. Again, the videotape evidence against the defendants, corroborated by the testimony of Murtha and other non-government witnesses, established an overwhelming case. (*United States* v. *Myers,* 527 F. Supp. 1206, 1214 (E.D.N.Y. 1981).)

Judge Pratt also discussed the videotape sessions and the allegation that the government had rendered them deliberately ambiguous:

> With each defendant brought before the TV cameras, the criminal nature of the proposed deal was made clear. Each of the congressmen was a sophisticated politician who clearly was aware what was being requested of him and what the money was being offered for. While Amoroso and Weinberg talked around the point somewhat and did not mention the word bribe in the on camera discussions, they handled the matter in each case as tactfully and delicately as one might suppose, given the nature of their undercover role as agents of foreign principals offering a bribe to a high public official. But, as the videotapes clearly showed and as the juries necessarily concluded, each congressman was aware of the criminal nature of the transaction, and each acted willfully. (*Id.* at 1227.)

As to Thompson's complaints about the October 9 meetings in particular, Pratt held: "Placing these recorded meetings together, Thompson's understanding of what was happening and his willingness to accept the bribe money were crystal clear to the jury and to this court." (*Id.* at 1237.)

The Court of Appeals also considered the allegations that the government had rendered the evidence deliberately ambiguous and thus had infringed Thompson's and Murphy's rights. The Court held:

> Perhaps at some point deliberate governmental efforts to render ambiguous events over which agents can exercise considerable control would transgress due process limits of fundamental fairness. Whatever those limits

> might be, they have not been crossed in these cases. Undercover agents offering bribes to the Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture . . . . They need not say, "Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action." (692 F.2d 823, 843–44 (2d Cir. 1982) (citation omitted).)

The Court acknowledged that there were ambiguities in the Thompson and Murphy sessions, especially when compared to those of Myers and Lederer, and held that "the events and conversations at those meetings . . . create fair questions of fact as to whether Thompson or Murphy knew that money was in the briefcase, and whether the money was received." (*Id.* at 844.) The Court further held, however, that the ambiguities were caused not by the deliberate action of the government, but by Thompson's and Murphy's own cautious ground rules:

> The caution displayed by Thompson and Murphy permitted them a chance to confront the jury with a contestable question of fact. The jury, asked to determine the factual question of whether Thompson and Murphy knowingly took money while seeking to minimize the incriminating nature of their own words and conduct, saw through the ploy. Facing the legal issue of whether the investigators' bribe offer was unfairly obscured we are equally unmoved. The agents did not violate due process limits by observing the defendants' ground rules. (*Id.* at 845.)

3. Summary of Select Committee Conclusions

The Select Committee concludes that the video tapes of the October 9 and October 20 meetings are somewhat more ambiguous than the video tapes of the sessions with the other Congressional Abscam suspects. Unlike the cases of Representatives Myers, Lederer, Kelly, and Murtha, no money was actually shown to Representative Thompson or to Representative Murphy, and neither actually left the meeting with any money in his possession. The meeting with Murphy on October 20, 1979, is more ambiguous than the ones on October 9, 1979, with Thompson.

Notwithstanding these ambiguities, the Select Committee finds, by the preponderance of the evidence, that Thompson and Murphy knew the purpose of their respective meetings and knew that money was being passed.[198] On the basis of the video tapes, the evidence of the Congressmen's knowledge prior to these meetings, and the evidence of the Congressmen's conduct after these meetings, the Select Committee finds that neither Thompson nor Murphy was duped into appearing before the video tape cameras. The Select Committee finds that both men were willing participants in meetings during which money was passed in return for assurances that they would assist the sheiks.[199]

---

[198] The Select Committee is not a court and makes no finding regarding Thompson's and Murphy's claims of due process violations.

[199] It should be noted that Murphy was acquitted of bribery, but convicted of accepting an illegal gratuity.

The Select Committee further finds that the meetings in question were not intentionally designed to be ambiguous. The ambiguities that resulted were caused by Special Agent Amoroso's analysis of how explicit he could be to either Thompson or Murphy. These two Representatives were more senior, more experienced, and more circumspect than the other Congressional Abscam defendants. Middleman Howard L. Criden had made clear that Thompson and Murphy would have to be treated differently from how Myers and Lederer had been; they would not have handled the money personally. Amoroso believed, therefore, that the meetings themselves had to be similarly circumspect.

The Select Committee is troubled, however, by the manner in which the decisions regarding how money was to be passed were made. Special Agent Amoroso apparently made decisions on how to pass money, and how explicit an acknowledgment needed to be made by a suspect, without careful deliberation beforehand with either his superiors within the FBI or with attorneys from the Department of Justice. Despite instructions from FBI HQ that on their face seemed to forbid it, Amoroso allowed Criden to leave both meetings in possession of the money.

As a matter of policy, however, the Select Committee does not fault Amoroso's decisions. The ambiguities that resulted created a suboptimal situation, but, with regard to Representative Thompson in particular, there was no need for Amoroso to have been more explicit. Thompson's awareness of the contents of the briefcase was crystal clear. There was no need for Amoroso to have risked upsetting Thompson and possibly damaging a strong case. With regard to Representative Murphy, however, the wisdom of Amoroso's actions is somewhat less clear. Although it concludes that Murphy knew the purpose of the meeting, the Select Committee believes that Amoroso could have been more explicit without unduly jeopardizing the case against him.

The Select Committee recognizes that undercover operations place a burden on the undercover agents. Many decisions have to be made at the field level, often without time for careful deliberation. As a practical matter, the agents need considerable discretion to operate as they see fit. There must, however, be limits to this discretion.

The Select Committee does not believe that these limits should include rigid requirements on how bribes must be passed. It is quite possible that, had Amoroso shown money to Thompson and Murphy, or had he required them to take personal possession of the briefcase, they would have balked, not because of integrity, but because of circumspection.

The Select Committee concludes that limits on an undercover agent's discretion should be developed within the agency through better, more complete agent training, including more continuing education programs; through closer supervision over undercover operations by FBI supervisory personnel, especially those at FBI HQ, because supervisory personnel at FBI HQ are in a better position to be objective and dispassionate; and through close cooperation between the FBI and Department of Justice attorneys, who have ultimate prosecutorial responsibility and who have a greater knowledge and awareness of sensitive legal issues, such as entrapment.

4. The October 9, 1979, Meetings With Representative Thompson

On October 9, 1979, sometime before Thompson and Criden arrived at the FBI's Washington, D.C., townhouse at 1:15 p.m. for the first meeting—the only one that had been scheduled in advance—DeVito (Special Agent Amoroso) on video tape placed $50,000 in an envelope, placed the envelope in an attaché case, closed the case, and laid it on a chair in front of where he was sitting at the time. (*Thompson* Gov't Trial Ex. 7A-1, at 1.) Shortly after Thompson arrived, Weinberg asked him, "Did Howard explain to you?" (*Id.* at 6.) Criden answered that Thompson was aware that DeVito and Weinberg represented two people from the Middle East. Weinberg explained that, because the sheiks were afraid of political overthrow, they wanted powerful sponsors in order to gain permanent entry into the United States and thus to avoid the fate of the Shah of Iran and of Somoza, the former President of Nicaragua (neither of whom, after having fled his country, had settled in the United States). Thompson and Criden bragged about Thompson's power and influence as Chairman of the House Administration Committee (*id.* at 7–8), and Thompson explained how a Member of Congress could introduce a special bill on behalf of a foreign national.[200]

DeVito and Weinberg focused their questions on the specifics of what a Congressman could do regarding private immigration bills. Thompson stressed that getting a private immigration bill through Congress was a difficult process; that he would do what he could to assist passage, but could not guarantee success; and that in the past he had been able to pass a private bill on the same day that another Representative had failed in a similar attempt. He said a friend of his probably could have obtained asylum for Somoza.[201] (*Id.* at 9–12.) Eventually, DeVito asked Thompson if the introduction of a bill would slow deportation:

> THOMPSON: Well, it can be stalled but it's very difficult, very difficult.
>
> DEVITO: Well, that's what the money is for, is to, is to, you know, keep this thing going.
>
> THOMPSON: Well, I'm not looking for any money and uh . . . It depends on the circumstances. I mean, if the person is clean, not a Communist and not a known criminal and . . . . (*Id.* at 13.)

Although momentarily flustered, Thompson quickly recovered his composure and did not express anger or dismay at the reference to money; the discussion merely shifted to the sheiks' country of origin. Thompson called one of his aides and posed a hypothetical question about how a citizen of the United Arab Emirates would apply to the United States for political asylum. (*Id.* at 13-17.) Thompson also told DeVito and Weinberg that he would like to introduce them to other Congressmen who liked "to help people from other countries." (*Id.* at 18.)

---

[200] At this point in the meeting, Amoroso received a telephone call. He did not talk to whomever had called, saying he was in a meeting. (*Thompson* Gov't Trial Ex. 7A-1, at 9.) Amoroso testified at the *Myers* due process hearing that the call had come from FBI Supervisor Michael Wilson, who had wondered if Thompson had arrived. (*Myers* D.P. Tr. 3964–65.) Good testified in the same proceeding that he thought the call had come from John Jacobs, who had monitored the meeting. Good, saying that he was "guessing," thought that Jacobs had told Amoroso not to make payment. (*Id.* 2699–701.) Given the timing of the call, and given that Amoroso received it, the Select Committee concludes that Amoroso's memory is more likely to be correct.

[201] Thompson testified that he had been referring to Murphy. (*Thompson* Trial Tr. 2482–83, 2500–01.)

> WEINBERG: Well like I say, he's interested in having friends there that he could depend upon.
>
> CRIDEN: Well, that's what we're here for, Mel.
>
> THOMPSON: Well, I don't know how many more ways I can say it. (*Id.*)

The topic of investment in Thompson's district was first raised several minutes into the conversation, after the discussion of the sheiks' immigration problems and after DeVito had mentioned that he would plan for Thompson's help on immigration matters.[202] Thompson said that he wanted several hundred thousand dollars in certificates of deposit to be invested in his district in banks owned by his constituents. (*Id.* at 19-22.) Thompson then mentioned for the third time bringing other Congressmen to see Weinberg and DeVito. (*Id.* at 26.) He also tested his telephone beeper and received a call from his office. (*Id.*) The meeting ended somewhat awkwardly. When Thompson left the room for a moment, Criden asked what he should do, and DeVito told him to take Thompson back to the Capitol and then to return. DeVito wanted to "talk" with Criden. Thompson, as he left with Criden, said, "On the basis of this conversation, I'll be glad to help if I can." (*Id.* at 27.)

Thompson testified in his own behalf at trial. He testified that he had not seen a briefcase during the first meeting (*Thompson* Trial Tr. 2297) and that DeVito's reference to money had been the first mention of money he had heard in connection with Abdul Enterprises (*id.* at 2299-300). He had agreed to the meeting because Criden had told him that wealthy Arabs were interested in investing in his district. He testified that he had not expected to see Criden again on October 9, 1979, and he denied all of Criden's video taped statements made about him when Criden returned to the W Street townhouse after the first meeting. (*Id.* at 2303-14; *see Thompson* Gov't Trial Exs. 7A-2, -3, -4.)

After having taken Thompson to the Capitol, Criden returned alone at 2:49 in the afternoon. (*Thompson* Gov't Trial Ex. 7A-2.) He was very upset. He claimed that he had arranged with Thompson that he, rather than the Congressman, would pick up the package and that there would be no mention of money. He claimed that he had had such a scenario approved by Weinberg and had made commitments to Thompson on the basis of that approval. (*Id.* at 6-8, 10-14.) Criden feared that Thompson would think he had been cheated. Weinberg said that he had told DeVito about the plan for Criden to pick up the package and had obtained approval for that change in procedure, but that he had not told DeVito not to refer to money.

---

[202] Investments had been mentioned in passing earlier by Criden as Thompson was trying to phone his office. (*Thompson* Gov't Trial Ex. 7A-1, at 14.)

DeVito would not agree to that latter aspect of the new scenario. He required that Thompson acknowledge that he was being paid. DeVito was afraid that without an explicit acknowledgment Criden could leave the meeting with the money and pocket the entire amount without Thompson's being aware of what had happened. The problem had been exacerbated by Thompson's statement that he did not want money. DeVito suggested that he was inclined to be cautious, particularly after a prior incident in which an imposter had been brought to him. (*Id.* at 9.)[203]

Weinberg suggested that Criden go back to Thompson and convince him to meet alone with DeVito. Weinberg said that he himself would leave to help allay Thompson's suspicions. Weinberg told Criden to tell Thompson that all he would have to do would be to come back to the townhouse and personally take possession of the briefcase. He would not have to say anything. (*Id.* at 19, 24.)

At first DeVito was unwilling to bend his rules. If Thompson would not acknowledge receipt of the money, DeVito preferred to cancel the transaction entirely. He was even willing to call Thompson's office in an effort to get Criden "off the hook." (*Id.* at 27–28.)[204]

Eventually, Criden and DeVito agreed to a new plan:

> Criden: I'll try to get him to come out. Hand him the fuckin' attaché case.
>
> DeVito: I'll give him the attaché case.
>
> Criden: No conversation except that here's some documents or shit like that.
>
> DeVito: All right.
>
> Criden: O.K? Let him walk out with the envelope.
>
> DeVito: Ah, in the case.
>
> Criden: Yeah.
>
> DeVito: I'll give him the case. Alright, that's good. Fine, then I know he's got it. I'm happy. Then I know that. . . . (*Id.* at 32–33.)

Later in the day, as Criden was about to go to try to convince Thompson to return, he and DeVito went over the newly agreed upon ground rules again:

> DeVito: I understand, I, eh, eh, and I, and I, I'm, I'm hurt, by, you know, by what's happened because I, I want to do somethin'. Let's, let's see, the guy, the guy may just say, "OK.—Fine one-on-one. I'll take the briefcase. We, you know, I won't say anything. I'll let him give it to me and off I go."
>
> Criden: O.K.
>
> DeVito: That's good. That's fine. At least, you know at least then, then I know that he's got the money and off he

---

[203] *See* pp. 434–35 *infra*.

[204] Criden said he was frightened of what Thompson would do to him, since it appeared that Criden was cheating him. Also, Criden was concerned that Abdul was creating a very powerful enemy, when, if DeVito would bend his rules just a bit, the sheik would have a very powerful ally. Later in the day on October 9, Criden explained why Thompson was so important: "This guy can deliver to us as many as we want. But, the best thing about this guy is that he can deliver us to key guys. But, he'll know who, you know, who'll do business and who won't." (*Thompson* Gov't Trial Ex. 7A–4, at 3.)

> goes. And that's fine. That's fine. . . . (*Thompson* Gov't Trial Ex. 7A-4, at 2.)

Criden said that Thompson might want him present, even under the new scenario. DeVito agreed.

Before Thompson and Criden returned to the townhouse at 7:02 p.m., DeVito, at 5:30 p.m., placed $50,000 in a briefcase, closed the case, placed it on an end table and said, "This briefcase will be given to Congressman Thompson when he arrives for this meeting." (*Thompson* Gov't Trial Ex. 7A-5, at 1.) Weinberg, as had been planned during the interim meetings with Criden, did not attend the second Thompson meeting.

The second meeting opened with the following conversation:

> CRIDEN: Okay, Frank understands the situation, Ton. . . .
>
> DEVITO: You know, and you know I just want to make sure that, you know, you understand. There's the briefcase. . . .
>
> [Criden moves briefcase from end table and places it next to Thompson.]
>
> THOMPSON: You look after that for me will you? [to Criden]
>
> CRIDEN: Okay.
>
> DEVITO: Okay, well, as long as I know now, okay. I think he explained to you. . . .
>
> CRIDEN: Yes, I did.
>
> [Thompson nods.]
>
> DEVITO: . . . what the position was and I didn't want any misunderstanding. Although I trust Howard, okay, I got to, I got to play it safe from my end. I didn't know what, what he was telling you.
>
> THOMPSON: I got these [gestures with glasses]. . . . (*Id.* at 1, 2.)

Criden and Thompson repeated the plan that Thompson had mentioned three times during the first meeting to bring other Congressmen to meet DeVito and to provide immigration assistance for the sheik. Thompson said that he preferred for Criden to handle all the details of these future meetings, because it was better to work through lawyers. (*Id.* at 2.)

Only after all of these preliminary matters had been disposed of did the conversation turn to the topic of investments for Thompson's Congressional district. Thompson wanted DeVito and Weinberg to invest money in local banks at two percent less interest than Abdul Enterprises had been earning at the Chase Manhattan bank. (*Id.* at 6-10.) DeVito agreed to make these investments to give Thompson an excuse, for his constituents, to help the sheiks on immigration matters. (*Id.* at 7.) DeVito told Thompson, "Everybody was shadow boxing, I guess, earlier," to which Thompson responded, "Well, you have to be careful." (*Id.* at 8.)

DeVito later apologized for holding the meeting in a house rather than in a hotel:[205]

> Thompson: This is fine. This is fine.
>
> DeVito: Well, you know, as long as you're comfortable with us now. . . .
>
> Thompson: Well, I'm more comfortable now than I was earlier, and so are you, in fact. (*Id.* at 11.)

DeVito told Thompson that he had asked Criden to return to the townhouse after their first meeting because he did not know what Criden had told Thompson before that meeting and wanted to clarify the situation.

> DeVito: [He] may have told the man: "Come down and see me, I'm gonna take you down and see this fellow. He's a great guy. Kill a half hour with this shnook, you know, shnook here, he's good for a ten thousand dollar campaign contribution."
>
> Thompson: No, no.
>
> DeVito: . . . Howard's going to walk away with everything I own here.
>
> Thompson: No.
>
> Criden: Let me explain, as I told ya Tony. . . .
>
> Thompson: In the first place I wouldn't take a ten thousand. . . .
>
> Criden: (Laughs)
>
> DeVito: No, no, no, I didn't mean, I didn't mean it put up as far as that was concerned now. I'm saying he could of told you and come over. . . .
>
> Thompson: Oh, certainly. How do you know who I am? (*Id.* at 11–12.)

DeVito told Thompson that he had had the problem of being deceived by an impersonator before. Thompson said, "That's one reason why I brought that page with me." (*Id.* at 12.) As they were getting ready to depart, Criden and Thompson both reached for the briefcase that Criden had earlier placed at Thompson's feet. After a brief struggle, Thompson allowed Criden to leave with the briefcase in his possession.

Thompson testified at his trial that he had gone back to the W Street townhouse to talk about specific investments and to advise DeVito and Weinberg of what his aide, whom he had called during the first meeting, had discovered regarding the sheiks' possible immigration status. (*Thompson* Trial Tr. 2318.) He said that Criden had told him that DeVito and Weinberg had been upset that he had called his aide: they had wished to keep the sheiks' potential plight a secret. Thompson testified that he had given Criden a card listing the names of some local banks in which he had wanted

---

[205] During the planning of the Thompson meeting, Criden had said that Thompson was reluctant to meet anywhere other than in a hotel. (*Thompson* Gov't Trial Exs. 5A, 6A.) After Thompson left following the first meeting on October 9, Criden complained that DeVito and Weinberg had not known the price of the house, thereby increasing Thompson's anxiety, which Criden had attempted to quiet during the ride from the Capitol to the house. Criden said he had had to reassure Thompson, on the ride back to the Capitol, about DeVito and Weinberg.

Abdul Enterprises to invest. Criden had not mentioned anything about either money or a briefcase. (*Id.* at 2318–19.)

Thompson testified that when he had returned for the second meeting, he had not noticed the briefcase and had not noticed Criden moving it. (*Id.* at 2320–21.) When Criden had said, "Frank understands," Thompson had understood him to be referring to DeVito's anger over Thompson's earlier call to his aide, and to the banks that Thompson had listed on the card he had given to Criden. (*Id.* at 2321.) He had not known what the briefcase contained, had never been shown its contents, had never been told its contents, and had never been shown money. (*Id.* at 2322.) When he had told Criden "to look after" the briefcase for him, he merely had meant for Criden to examine it to see whether it had contained anything relating to investments in his district. (*Id.* at 2324.) When he had said that he would not take a $10,000 contribution from Criden, he had not been joking; he had been telling everyone that he would not accept money under any circumstances. (*Id.* at 2327.) When he had handed the briefcase to Criden, he had not been taking it himself and had not been having Criden take it for him. He had thought that the briefcase belonged to Criden. Criden had not opened the briefcase or discussed its contents when Criden's limousine had driven Thompson home.[206]

The Select Committee disbelieves Thompson's allegation that he was unaware of the purpose of the meetings on October 9, 1979. DeVito's mention of money during the first meeting was not ambiguous. He clearly stated that he was attempting to buy time for the sheiks once they came to America permanently. The offer was unambiguous enough for Thompson to have disclaimed any interest in money. In fact, his coolness after having received such an obvious bribe offer counts heavily against his argument that he was ignorant of the true import of the meeting. Rather than having become upset with DeVito, and rather than having left the meeting, or at least having had DeVito explain why he thought Thompson was interested in receiving money, Thompson simply continued with the meeting as if nothing untoward had happened; he offered to help the sheiks as much as he could, and he volunteered to recruit other Congressmen to help the sheik.

The video tape of the second Thompson meeting is clear evidence that Thompson knew the purpose of the meeting and the contents of the briefcase. Thompson's claim that he returned merely to discuss investments is unpersuasive. The discussion was couched in terms of investing in Thompson's district to make it easier for Thompson to help the sheik. The video tape offers no support for Thompson's position that, when he gestured with his glasses and said, "I've got these," he was referring to DeVito's concern over Thompson's earlier telephone contact with his aide.[207] Further,

---

[206] On cross-examination, Thompson admitted that his testimony was considerably at odds with what he had told the FBI on February 2, 1980. At that time, he told the government that he had met with DeVito and Weinberg on October 9, 1979, but had denied that money had been mentioned, that immigration had been discussed, or that a briefcase had changed hands. He called these misstatements inaccurate (in that he was inadvertently wrong), rather than untrue. (*Id.* at 2355–68.)

[207] The topic of Thompson's telephone call during the first meeting had been raised during the interim meetings between Criden and the undercover agents. Criden had said that Thomp-

Continued

the Select Committee concludes that few Members of Congress meeting on matters of legitimate business refer to being "more comfortable" and having "to be careful."

Thompson's actions following the October 9 meeting reinforce the Select Committee's conclusion that he was a knowing participant in that meeting. The most damaging evidence against Thompson came from the testimony of his fellow Representative, John Murtha. Murtha testified that Thompson had come to him on the floor of the House of Representatives in late October or early November 1979. Thompson had said that two wealthy Arabs were looking to invest in Congressional districts and might need immigration assistance. (*Thompson* Trial Tr. 1818.) A week later, Thompson had again approached Murtha and had told him that there would be $50,000 in "walking around money" available for him. (*Id.* at 1819.)

Murtha further testified that he had met with Thompson and Criden in Thompson's office on January 7, 1980. Thompson had told Murtha during this meeting that all he had to do was to go visit the representatives of the wealthy Arabs and listen to their story, and then Criden would pick up the money. (*Id.* at 1824–26.) Thompson had told him that Thompson, he, and Murphy would then split the money. (*Id.* at 1828.)

Murtha then accompanied Criden to meet with DeVito and Weinberg. Murtha declined to take any money directly. He wanted DeVito to invest in his district first. He said he might change his mind after DeVito delivered on his promises. (*Thompson* Gov't Trial Ex. 29A-1, at 10–38.) Murtha did tell DeVito that his colleagues expected to be paid:

> CRIDEN: John says it's ok for you to give me what's in that, that drawer.
>
> MURTHA: Is that all right, Tony? Let, let me make it very clear. The other two guys, ah, do expect to, ah, to be taken care of, as, as Howard, and you're gonna have to deal through Howard, they, me, you got my deal, ya know so that's, that's, ah, my deal is. (*Id.* at 38.)

Murtha testified that he had been referring to Thompson and Murphy, based on what Thompson had told him earlier that day. (*Thompson* Trial Tr. 1832.)

Middleman Howard L. Criden testified before the Select Committee that he believed Thompson had known the contents of the briefcase on October 9, 1979, prior to having had Criden take it. Criden also testified that Thompson clearly had known the contents of the briefcase shortly after the meeting, when Criden had given him $20,000 in the car. Criden testified that he had given Thompson another $20,000 on October 22 for Thompson and Murphy to divide. (Sel. Comm. Hrg., Sept. 14, at 86–89 (testimony of Howard L. Criden).) Thompson admitted having met Criden on October 22. (*Thompson* Trial Tr. 2537–38.)

---

son had expressed concern during the ride back to the Capitol that DeVito and Weinberg had seemed uncertain of the sheiks' country of origin. DeVito had countered by saying he had been upset that Thompson had been leaking very sensitive information. (*Thompson* Gov't Trial Ex. 7A-2, at 36–37.)

Regardless of the Select Committee's conclusion that Thompson knew the purposes of the October 9, 1979, meetings, the behavior of the undercover operatives both before and during those meetings remains a key issue. Thompson complained that his rights had been violated because he had been brought back for a second meeting after having turned down money during the first. He also complained that no one had probed Criden to see what he had told Thompson; no one had ever shown him any money; and Criden had been permitted to leave in custody of the briefcase. (*Thompson* Post-hearing Memorandum To Dismiss on Due Process Grounds, 115–24.) The Select Committee has investigated whether any of these decisions was made improperly; it concludes that none was.

The approval document for the Thompson bribe payment offers some support for Thompson's position. The document instructed that a payment be made "directly to Congressman/Senator only after necessary commitments are provided." ([Deleted]) [208] In addition, the payments to Myers and Lederer had been made directly to the Congressman and not to the middleman. October 9, 1979, was the first occasion involving a Congressman in which the middleman left the room with possession of the money and the first in which no money was displayed to the Congressman.[209]

Supervisor Good testified at the *Myers* due process hearing that he had been given no instruction loosening the requirement of a direct payment "to Congressman/Senator" for Thompson. Thompson was the only member of the House brought back for a second meeting after having turned down money, and that was done because he had agreed to the conditions that had been set out during the interim meetings by Amoroso. (*Myers* D.P. Tr. 2695.) After the first meeting, during which Thompson had declined money, Good had conversations with Amoroso, Jacobs, Weinberg, and Brady during which they decided to see whether Criden could convince Thompson to acknowledge taking money. (*Id.* at 2705.) Good kept FBI HQ Supervisor Michael Wilson apprised of the situation (*id.* at 2708), while Jacobs, who had been the Department of Justice Strike Force attorney monitoring the meeting, kept his supervisor, Puccio, informed of all developments (*id.* at 2705–07). Although the written instructions had been to give the money directly to the Congressman, Good understood that it was a permissible alternative to give money to another person designated by the Congressman, so long as the Congressman had acknowledged receipt. (*Id.* at 2703.)

Good testified before the Select Committee that he had made the ultimate decision on whether to allow any particular payment to be made. He had not stopped Amoroso on October 9 because he had believed without any doubt that Thompson had known what was in the briefcase. It had not bothered him that Thompson merely took constructive possession. (Sel. Comm. Hrg., July 27, 1982, at 125 (testimony of John Good).) Judgments on how to pass money had to be left to those in the field. (*Id.* at 126.)

---

[208] The omission of a citation to a confidential document is identified by "[Deleted]." *See* pp. V–VI *supra*.

[209] The payment on March 31, 1979, involving Kenneth MacDonald, the Vice Chairman of the New Jersey Casino Control Commission, raises similar issues. That payment was the first in which a middleman, in that case Errichetti, left the meeting with possession of the money. There was also a question raised whether MacDonald himself actually saw the money. There was no allegation, however, that the government deliberately had made the meeting ambiguous. The MacDonald transaction is discussed in detail at pp. 253–61 *supra*.

Puccio testified at the *Myers* due process hearing that he had been in contact with the undercover personnel at the scene on October 9, 1979. He had suggested that Amoroso pressure Criden to see how he would react. Puccio said that all indications had been that Thompson would take a bribe, including the past reliability of Criden in bringing in Myers and Lederer and the general unsavory nature of Amoroso, in his role as DeVito, and Weinberg. Puccio had thought it important to clarify the situation that had been created by the first Thompson meeting before bribes were offered to any more Congressmen. (*Myers* D.P. Tr. 246–47, 253–55.) Puccio testified that the decision on how to pass the bribe—whether to show the money or not—had been a field decision by Good or Amoroso and had not been a matter of policy as far as he had been concerned. He had been unaware of any memorandum from Director Webster or from anyone else to the contrary. He did note that Errichetti had been upset at the way the MacDonald payoff had been handled. Puccio remarked that he believed that a closed container was the way bribes generally were passed in the real world. (*Id.* at 262–64.)

Puccio also testified on this issue before the Select Committee. He said that he believed that the agents had obeyed the directive to make the payment directly to the Congressman; Amoroso had made the payment the way he had felt it had to be done under the circumstances. Puccio also said that he would never have given an instruction that money could be given only to the principal rather than to the middleman. As far as Puccio was concerned, it made no difference whether Representative Thompson took the money or whether Criden did. He claimed that there was no legal or factual distinction, as long as Thompson made the necessary acknowledgments. (Sel. Comm. Hrg., July 27, 1982, at 120–21 (testimony of Thomas Puccio).) Puccio said that law enforcement people really are not all that well versed in how bribes are made and passed. He said that one has to rely on those in the field to use common sense and exercise their best judgment. (*Id.* at 126–27.)

Amoroso testified at the *Myers* due process hearing that he had not been deliberately ambiguous during the second Thompson meeting. He admitted, however, that he had never asked Criden how he had gotten Thompson to return. (*Myers* D.P. Tr. 3975.) He said that he had been satisfied during the second meeting that Thompson had known why he was being paid money. Otherwise, Amoroso had exceptionally poor recall of what had transpired during the interim meetings with Criden between Thompson's two visits. (*Id.* at 3970–74.) He did not recall any instruction that he had been ordered to pay money directly to Thompson; nor did he recall whether any of his supervisors had ever told him that it mattered whether the Congressman or the middleman took the money. (*Id.* at 3965–66.)

The Select Committee concludes that Special Agent Amoroso agreed to be more circumspect with Representative Thompson at the urging of Howard Criden. On September 26, Criden told Weinberg that he was having difficulty getting Congressmen to help the sheik if they had to take money personally. Criden recommended, therefore, that he be allowed to take possession of the "package." (*Thompson* Def. Trial Exs. MD, ME.) Weinberg told Criden that he thought there would be no problem, but he wanted to get the "new way" approved by Amoroso because of the problems that had arisen as a result of the "Noto" incident.[210]

On October 2, 1979, Criden tried to arrange a meeting between Abdul Enterprises and Representative [deleted].[211] He told Weinberg, "He [deleted] doesn't want any mention made of funds." (*Thompson* Gov't Trial Ex. 2A, at 2.) Weinberg told Criden to "pass" on [deleted] because [deleted] would only hold the meeting at his office. Weinberg acted as if he suspected a trap. It is not clear whether [deleted] alleged requirement that money not be mentioned played a role in Weinberg's decision to cancel.

On the morning of October 4, Criden complained to Weinberg that he had been having trouble finding suitable candidates:

> [L]et me tell you, to convince these guys to do this number is not as easy as you think it is. . . . They make a commitment to you; they get chicken feet, and they say they don't want to do it or they want to do it this way or they want to do it that way. . . . (*Thompson* Gov't Trial Ex. 3A, at 3-4.)

Later that day Criden called Weinberg to tell him that he had arranged a meeting with Thompson. He said he had met Thompson personally and had explained the "rules of the game." (*Thompson* Gov't Trial Ex. 4A.)[212]

Criden's law partner, Ellis Cook, testified that prior to October 9 Criden had told him that he had arranged for a meeting during which Thompson himself would not have to take the package. (*Thompson* Trial Tr. 1241-42.)

Thus, Amoroso had agreed prior to October 9 that Thompson's meeting would be less explicit and thereby more ambiguous than the Myers and Lederer meetings that had preceded it. This arrangement was still too explicit for Thompson, however. He refused to acknowledge during the first meeting on October 9 that he was taking money.

During the interim meeting on October 9, Amoroso agreed to even further reductions in the requirements for taking the money. Amoroso agreed that Thompson would merely have to acknowledge receipt of the briefcase and that no one would mention money. This procedure proved to be acceptable to Thompson.

It is unclear how much consultation Amoroso had had with Good, Puccio, Jacobs, or Sharf about the new procedure. Good and Puccio have testified that it made no difference to them whether Thompson or Criden actually took possession of the money. Given the approval document, however, which called for a *direct* payment to the Congressman, the Select Committee is disturbed by the way in which the decision to be less explicit with Thompson apparently was made. While it finds Amoroso's handling of the Thompson meeting acceptable, if not optimal, the Select Committee is troubled by the lack of careful consideration with which exceptionally important decisions were made.

---

[210] The participants in the September 26 conversation did not refer to the Noto incident by name. The incident had occurred on September 19, 1979, when Criden and Errichetti had presented Criden's law partner as an official of the Immigration and Naturalization Service. Amoroso and Weinberg had seen through the ruse and had cancelled the meeting, but they did not learn until much later that Criden had participated in the attempted fraud. (*See* pp. 434-35 *infra*.)

[211] The omission of sensitive information is identified by "[deleted]." *See* pp. V-VI *supra*.

[212] On October 5, Criden and Weinberg talked twice to try to arrange for the place in which to hold the Thompson meeting. Criden was concerned because he had told Thompson that the meeting would be in a hotel, and Weinberg was changing it to a house. (*Thompson* Gov't Trial Exs. 5A, 6A.)

5. The October 20, 1979, Meeting with Representative Murphy

The video tape of the October 20, 1979, meeting with Representative Murphy begins with Special Agent Amoroso placing $50,000 in a suitcase that he then closes and places on the floor next to a couch. (*Thompson* Gov't Trial Ex. 13A, at 1.) After Murphy arrives, DeVito (Amoroso) tells him that he has talked to Murphy's colleague. It is clear from the context that the reference is to Thompson. DeVito then says, "Howard, ah, explained to you what we're looking for, for our Arabs, all right." Murphy responds: "Right." (*Id.* at 5.) They then discuss the immigration problems of Somoza (who was a high school friend of Murphy's). (*Id.* at 5–7.) When Weinberg and DeVito turn to specifics about legislation and immigration, Murphy tells them to check with Criden (who, Murphy thought, was the lawyer for Abdul Enterprises). (*Id.* at 10, 13–15.) Criden says that Murphy has suggested that the sheik's immigration posture would be enhanced by his, the sheik's, buying a residence. When Weinberg tells Murphy they will do whatever he wants, he tells them to "talk to Howard." (*Id.* at 10.)

DeVito says that the sheiks are willing to invest in Murphy's district to make it easier for Murphy to support the Arabs' immigration efforts. (*Id.*) Murphy tells them, "Howard's gonna have a recommendation for you," and "Howard's gonna ask you to meet with a couple of people." (*Id.* at 10.) Criden then tells DeVito and Weinberg that the proposed investment probably will involve a shipping company. Murphy reluctantly confirms Criden's statements. (*Id.* at 11.)

DeVito then returns to the subject of the sheiks' immigration and tells Murphy, "The important thing now is that, to have you"; Murphy holds up his hand and cuts off the remainder of the sentence. (*Id.* at 13.) When Weinberg notes that "the main thing" is that "you [Murphy] can handle it for us," Murphy replies: "I don't think there'll be any problem." (*Id.* at 14.) Weinberg asks Murphy about private legislation, and Murphy inquires whether the Arab is a soldier. (*Id.* at 15.) When Criden and DeVito talk about how the sheiks need friends, DeVito says, "That's why, hey, that's why he says, 'Take the money. Go find the people that can, that can do this for me.' " (*Id.* at 16.) Criden replies, "All you have to do is get hold of me. I will get hold of Jack."

Finally, DeVito stands up and moves closer to the couch on which Murphy is seated and beside which the briefcase is located. Weinberg tells Murphy that the deal being discussed covers only the sheiks:

> WEINBERG: One other thing I wanta, we're only dealing for the two of them now. For Yassir and Kambir Abdul Rahman. Any other, you explain to him?

Criden: Yeah. I just told him we were only interested. . . .

Weinberg: Anything other then it's a different deal with him.

DeVito: Yeah.

Weinberg: We're only talking for them two.

DeVito: Yeah, in other words, these, what we're, what we're coming up front with, the money for is just for these two guys.

Murphy: Yeah.

DeVito: Anything else, okay, is something else.

Criden: Different ballgame.

DeVito. And I'm thinking that, ah, we may have some family situations * * * which would be, ah, something, you know, in addition to that.

Murphy: I think Howard can handle that.

Criden: Okay.

DeVito: So. Here we go. This is. . . . [DeVito picks up the suitcase and begins to hand it to Murphy]

Criden: Okay. Why don't you give that to Jack or. . . .

DeVito: Here.

Murphy: Howard why don't you take care of that.[213] [Referring to briefcase] [Criden takes briefcase.] (*Id.* at 18–19.)

As Murphy is leaving, DeVito asks him whether the shipping deal will be directly to his advantage. Murphy replies that it will be generally to the advantage of the principals and to the whole economy. (*Id.* at 21.)

Murphy did not testify at his trial. He did, however, agree to a deposition before his indictment. He testified at this deposition that he had first met Criden on October 19, 1979, after having had been told of him by Representative Thompson. Thompson had told him that Criden had been representing some Arabs who were looking for investments. (Deposition of John M. Murphy, *Myers* D.P. Ex. 96, at 30.) Murphy said that Criden had told him the meeting was to discuss "an economic development situation" and also had mentioned that the Arabs might want to come to America at some future time. (*Id.* at 76–77.) The only reference to money had been an implication that Murphy could participate in any investment, but Murphy had told him that "under no circumstances would [he] have any part of business or . . . be involved in any money situation." (*Id.* at 75.) He denied any statement Criden may have made that they had discussed money in any other context. (*Id.* at 79–80.)

Murphy testified that he had understood that the colleague mentioned by DeVito (Special Agent Amoroso) at the beginning of the meeting on October 20 was Thompson. (*Id.* at 86.) When he had said he had understood DeVito and Weinberg and their employer's problem, he had been speaking generally. (*Id.* at 91.) When he had said—in response to Weinberg's statement that the main thing was that Murphy would "handle it"—that there would be no problem, he had not been saying that he would do anything. He had been saying, rather, that persons in the positions of the sheiks would have no problem getting into this country. (*Id.* at 104–08.) Murphy did not recall money's having been mentioned during the meeting. (*Id.* at 109.) After having viewed the tape during the deposition, Murphy testified that he had understood the reference to money not to refer to a payment to him, but to investments. (*Id.* at 112.) Murphy had no recall of having told Criden to take care of the suitcase. (*Id.* at 116.) He did recall that he had thought the suitcase contained credentials and applications and that Criden had told him that. Murphy said that he thought Criden had told him about credentials during the video taped meeting. (*Id.* at 118.) He did not know what kind of credentials or applications, however, and admitted that the video tape did not show anyone mentioning credentials. (*Id.* at 119–22.) The "take care of it Howard" comment had been made just to indicate that Murphy did not want the case. (*Id.* at 124.) Murphy testified that Criden had left the meeting with the suitcase and that Criden had never mentioned money to him and had never described the contents of the case. (*Id.* at 125.)

---

[213] The government alleged that Murphy said, "Why don't you take care of that *for me.*" After viewing the relevant section of the video tape, the Select Committee cannot be sure whether Murphy said "*for me.*" He was speaking very low and very fast at the time. The Select Committee concludes that Murphy's precise language in this respect is unimportant to a determination of his state of mind. He clearly was being offered the briefcase by Amoroso, and he just as clearly was transferring it to Criden.

The October 20 meeting was somewhat more ambiguous than the Thompson meetings on October 9 had been. Nevertheless, on the basis of the video tape, the Select Committee concludes that Representative Murphy knew what was in the briefcase and knew why it was being given. DeVito couched the discussion of investments in terms of providing cover in his district for Murphy's assistance to the sheik. The reference to money, while not as explicit as in other meetings with other public officials, clearly was not about investments. When DeVito said that the money was only for the sheiks and that additional family members would not be covered by the up-front money, he obviously was referring to the immigration matter that had been discussed earlier. He also was standing up and obviously was on his way to pick up the briefcase to give it to Murphy. At no time did Murphy exhibit any nervousness or anger at the express mention of money in a discussion of how he could use his Congressional office to assist private citizens.

When DeVito rose to deliver the briefcase to Murphy, Criden clearly announced, by asking him to give it to Murphy, that it contained something in which Murphy had an interest. Murphy said and did nothing to deny that he had an interest in the briefcase. He did not say, for example, "No, that's yours" or "Why should he give it to me?" He also never asked, "What's in it?" Instead, Murphy used virtually the exact words that Thompson had used 11 days earlier and asked Criden to "take care of" the briefcase. The Select Committee concludes that it is unlikely that Murphy's choice of words was mere coincidence. DeVito never explicitly said, "Here's the briefcase with the money," but in the context of the meeting there was no reason to suspect that it contained anything else. There certainly was no reason to think that it contained credentials, as Murphy has alleged. There was no mention of credentials during the meeting, and Murphy has never articulated the nature of the credentials he had in mind.

As with Representative Thompson, there is extrinsic evidence reinforcing the Select Committee's conclusion that Murphy was aware that he had been paid money to aid the sheiks. The shipping deal that Murphy and Criden mentioned on October 20 led to a meeting on November 8, 1979, with DeVito, Weinberg, Criden, and Larry Buser, the former head of a shipping company and a former consultant to Murphy's Congressional committee. (*See Thompson* Gov't Trial Ex. 18A.) Buser proposed that Abdul Enterprises acquire two shipping companies, Farrell Lines and Navieras, the Puerto Rican maritime company. Buser said that he assumed Murphy would be a silent partner (*id.* at 7) and explained in great detail what Murphy would do behind the scenes on behalf of the business:

> Because there's an industry going broke where there's a tremendous potential . . . now Murphy and I see a potential in that and it's these. The thing is to manipulate the acquisitions with the bill. . . . Without him [Murphy] we could get screwed. (*Id.* at 16.)

He also explained that Murphy and he had been planning for a long time how best to use their mutual talents, Buser's expertise, and Murphy's power:

> But it's all pure practical business input and objective as we can be. Now we waited all this time and we looked at a few companies and we banged around a little bit, but we haven't made a move. Now he says to me, "I think the time is right to make a move." (*Id.*)

Representative Murtha testified that when Thompson had told him about the wealthy Arabs, Thompson also had told him that Murphy was involved. Murtha testified that Thompson had told him that the "walking-around" money would be split by all three of them. (*Thompson* Trial Tr. 1826–29.) In his meeting with the government on January 7, 1980, Murtha mentioned Murphy as being one of the other Congressmen involved. He said he knew that Murphy was expecting payment. (*Thompson* Gov't Trial Ex. 29A–1, at 38.) Murtha did testify, however, that he had never actually discussed the sheiks with Murphy himself and had no knowledge that Murphy had ever received any payment. (*Thompson* Trial Tr. 1921–22.)

On January 10, 1980, Murphy met with DeVito (Amoroso), Weinberg, Criden, and Buser at the FBI's Washington, D.C., townhouse. A long discussion ensued about the proposed shipping deals. Although Murphy was careful to say he was "not in" the deal (*Thompson* Gov't Trial Ex. 33A–1, at 30), Buser said that Murphy would help the venture. Murphy indicated his assent nonverbally. When the participants divided up their shares in the proposed venture, a 14 percent interest was unallocated, about which Criden said, "Whatever is gonna have to be done is gonna have to be done." (*Id.* at 38.) Criden later assured DeVito that Murphy was indeed a silent partner, but was being very careful. (*Thompson* Gov't Trial Ex. 33A–3, at 1–4.)

Murphy and DeVito also met privately on January 10. Murphy expressed no surprise when DeVito told him of the Murtha meeting three days earlier, not even when DeVito mentioned obliquely that Murtha had declined money. In fact, Murphy made it clear that he was aware that money was involved, but continued to be very cautious about what he would express openly:

> DEVITO: [B]ut what happened, your name came up, okay? And, uh, Thompson's name came up, and, you know, and—and naturally then Murtha brought it up. So I says, "Well," I says, "you know, as far as I'm concerned," I said, "I don't care, you know, what you do." I says, "You know, I'm, I'm here talkin' to you." So, uh—uh, then Howard interceded and, uh, you know, he's—he's do you, do you know, uh, I mean I might be sayin' somethin' I shouldn't be sayin' to you—did—did you know what transpired here?
>
> MURPHY: No, but I—I imagine that, you see—any time money's mentioned where a public official is mentioned, there—there's automatically an ability to link 'em to something illegal or to taking a consideration for something, uh, that he's supposed to do or use his office to do, and there's no public official would ever be involved in anything like that.
>
> DEVITO: Well.
>
> MURPHY: Particularly Thompson, myself, or Murtha. We'd never do anything like that. See?
>
> DEVITO: Well.
>
> MURPHY: So there's the, uh, there's the problem. And——
>
> DEVITO: (Laugh) I, you're—you're play—you're being coy with me. I, you know, I'm . . .
>
> MURPHY: Sure.
>
> DEVITO: It's uh, and to be honest with you, the day I first met you, okay, when we were at the, that airport hotel there——
>
> MURPHY: Sure.
>
> DEVITO: Uh, I was reluctant to give you the money because you were, you were very——
>
> MURPHY: You didn't, you didn't give me any money.
>
> DEVITO: Well, okay, when——
>
> MURPHY: I never, I never received any money from anyone.
>
> DEVITO: Okay, when, uh, I gave it to——
>
> MURPHY: And—and then——
>
> DEVITO: I gave it to Howard.
>
> MURPHY: And would not accept anything.
>
> DEVITO: Okay.
>
> MURPHY: From you or Howard. (*Id.* at 14–15.)

Although he denied that he had received money, Murphy did not act angry or surprised that DeVito claimed to have given him money. He also did not express surprise when DeVito said that he, DeVito, had given "the money" to Criden. He also did not deny that he knew that Criden had received money. Instead, he simply continued on with the meeting. He clearly was, in fact, being coy and cautious, exactly as DeVito had alleged. As Criden had predicted, Murphy would not acknowledge personal receipt of money or his silent participation in the shipping venture.

Criden testified before the Select Committee that, contrary to what he had told Weinberg at the time (*see Thompson* Gov't Trial Ex. 12A), the first time he had spoken to Murphy had been on October 19, 1979, in a meeting at Thompson's office. (Sel. Comm. Hrg., Sept. 14, 1982, at 75–77 (testimony of Howard L. Criden).) Criden also testified that there had been no mention of money at this meeting, because Thompson had told him not to discuss money with Murphy; rather, the discussion had focused on the immigration problems of the sheik. (*Id.* at 76–77.)

Criden could not recall having mentioned money to Murphy during the time they had spent together on October 20, 1979, prior to meeting with DeVito and Weinberg. (*Id.* at 78.) Equally significant, however, is that he also could not recall having told Murphy that a briefcase, credentials, or documents would be transferred during the meeting. (*Id.* at 79.)

Criden testified that he had not given Murphy any money after the October 20 meeting. He did claim to have given $20,000 shortly thereafter to Thompson, who had told him he was sharing that money with Murphy. (*Id.*) Criden said that, when DeVito had attempted to pass Murphy the briefcase and Murphy had had DeVito give it to Criden instead, Criden had assumed that Murphy and Thompson had made the "appropriate arrangements" so that Murphy understood what to do. (*Id.* at 81.)

The Select Committee concludes, on the basis of the evidence described above, that Murphy knew full well what was in the briefcase and why it was being passed. The Select Committee further concludes that Murphy was being extremely cautious; he insulated himself even from Criden by dealing primarily with his fellow member of Congress, Frank Thompson. It is clear that Thompson had explained to Murphy DeVito's minimum standard for a transfer of the briefcase. Murphy used the same language that had worked for Thompson, but was unwilling to communicate openly.

To conclude that Murphy was unaware of the purpose of the October 20 meeting, the Select Committee would have to find that Thompson deliberately had misled his close political and personal friend and had pocketed the entire payment without Murphy's knowledge. There is no evidence in the record to suggest that Thompson was misleading Murphy.

In fact, even before Thompson's first meeting with Abdul Enterprises on October 9, 1979, Thompson had planned to involve Murphy in the scheme to receive money from the Arabs. At that meeting, Thompson referred to "a friend of mine whom I mentioned to Howard, [who] could have arranged permanent political asylum and residence for Somoza." (*Thompson* Gov't Trial Ex. 7A-1, at 10.) Thompson testified that he had been referring to Murphy. (*Thompson* Trial Tr. 2482–83, 2500–01.) Later during that meeting, Thompson mentioned a "number of friends who are members of Congress who like to help people from other countries" (*Thompson* Gov't Trial Ex. 7A-1, at 18) and urged that DeVito meet with "at least two and possibly four of my colleagues who are very senior and experienced in immigration matters." (*Id.* at 26.) During Thompson's second meeting on October 9, he again mentioned "the members of Congress whom I suggest who come up to visit with you . . . and that includes some people from New York on a preliminary basis" (*Thompson* Gov't Trial Ex. 7A-5, at 9) and said that "the first guy you might see might well be a pal of mine from New York, and if he comes, I'll come with him." (*Id.* at 10.) Thus, it appears clear that Thompson had planned to include Murphy in the corrupt scheme from the very beginning.[214]

Other evidence indicates that Thompson contacted Murphy immediately after his own meeting with Amoroso on October 9. Murphy's appointments secretary testified that on October 10 Murphy had scheduled a meeting with Thompson for 4:30 that afternoon. (*Thompson* Trial Tr. 1706-07; *see Thompson* Gov't Trial Ex. 47 (Murphy's appointment book).) Thompson actually did meet with Murphy in Murphy's office on that date.

The question remains, however, whether the government deliberately arranged for the video tape of Murphy's meeting to be more ambiguous than other taped meetings in order to deprive Murphy of the right to say "no" to an unambiguously corrupt proposal. The Select Committee concludes that this did not occur.

Good testified at the *Myers* due process hearings that he had no recall of any specific conversation, either with his undercover operatives or with any of the Strike Force attorneys, about how the money was to have been passed to Murphy: whether it would be in a briefcase or whether the money would be mentioned explicitly. (*Myers* D.P. Tr. 2728.) Good had met with Strike Force attorneys John A. Jacobs and Lawrence R. Sharf before the Murphy meeting, but could not recall the substance of the conversation; neither Sharf nor Jacobs had stayed to monitor the Murphy meeting. Good said that he generally would have preferred for money to have been handed directly to the Congressman, but some suspects they had felt would not have acknowledged pay-offs if made too directly. Good claimed that there was an etiquette of bribery that varied, depending upon the individual involved. The decision on how and when to make a payment had been left to Amoroso to decide on the spur of the moment. (*Id.* at 2726-31.) Good was unable to describe how the decision had been made to show the money to some congressmen and not to others. He could not say why Murphy had been given money in a closed case or when or why that decision had been made. He did say, however, that he had not thought that Amoroso ever had considered displaying the money directly to either Murphy or Thompson. (*Id.* at 2735.)

Puccio testified that he had participated in a strategy session on October 20, 1979, with Good, Amoroso, Weinberg, Sharf, and Jacobs. It had been a standard meeting on the general scenario and never had been memorialized. (*Id.* at 273-74.) He said that he had not been and was not aware of any rule or writing that directed who must handle the money or the briefcase. (*Id.* at 280–81.) As long as it had been clear that money was being given and that the recipient knew why money was being passed, a payment would have been made and Puccio would have been satisfied. (*Id.*)

---

[214] The FBI deduced by October 10, 1979, that Thompson had been referring to Murphy in the language quoted above. Weinberg told Criden he thought he could guess who the next candidate was. Weinberg correctly said Murphy, while Criden said Ryan. (*Thompson* Gov't Trial Ex. 8A, at 6.) Weinberg did not correct Criden until October 17, 1979. (*Thompson* Gov't Trial Ex. 12A, at 1.) Puccio testified that it was clear from discussions with Good on October 9 that Thompson had been referring to Murphy. (*Myers* D.P. Tr. 270.) Amoroso said he thought Good had told Weinberg that Thompson had been referring to Murphy. (*Id.* at 3892.) Weinberg also testified that Good had told him Thompson meant Murphy. (*Id.* at 4365.) Good could not specifically recall the incident. (*Id.* at 2776-77.) The Select Committee concludes that Representative Murphy was not unfairly targeted. (*See* pp. 58-59 *supra.*)

Amoroso also testified at the due process hearings. He testified that there had been no special arrangements made for the Murphy meeting, but did not recall the pre-meeting conversation with lawyers from the Department of Justice during which any special arrangements for how to handle the meeting would have been discussed. (*Id.* at 3922–23.) Amoroso had guided the Murphy meeting and had made a payment when he had been satisfied that Murphy knew that he was getting paid and for what reason. (*Id.* at 3924–26.) After having obtained the appropriate commitments from Murphy, Amoroso had started to make the payment directly to him. Amoroso had not minded giving the briefcase to Criden after Murphy had directed him to do so. He had considered this an adequate acknowledgment from the Congressman. (*Id.* at 3930–31.) Amoroso could not recall having discussed with anyone from the Department of Justice whether it would have been appropriate to allow the middleman to accept payment; but he had had no qualms about doing so with Murphy, because the same method had been used with Thompson, and none of the supervisors or Strike Force attorneys had complained. He also said that he did not make any decision before the meeting on October 20 about whether to mention a sum of money to Murphy. (*Id.* at 3932.) Amoroso testified that he had put the money in a briefcase for the Murphy meeting because he happened to have had one. At some other meetings, he had not had a briefcase. He did not recall ever having talked about the propriety of using briefcases or why he happened to have had one at that time. He testified that the decision to use a briefcase had been made without reference to Murphy. (*Id.* at 3932–37.)

The Select Committee concludes that the ambiguities in the meeting on October 20 were not caused by "the conscious and deliberate creation of ambiguous and misleading evidence" (*Murphy* Appellate Brief 60), but by the government's acceptance of the conditions set forth by Criden, Thompson, and Murphy under which Murphy would acknowledge receipt of money. The meeting on October 20 followed the pattern of the meeting on October 9, down to the very words that Murphy used to acknowledge receipt.

Amoroso had agreed to the conditions that Thompson had set out through Criden on October 9: He passed the money in a closed case and talked in a somewhat oblique way about the agreement being struck. Similarly, on October 20 the money again was passed in a closed case, and the purpose of the meeting was discussed circumspectly by Amoroso.

There is evidence that Thompson and Criden had briefed Murphy on how to act. On October 17 Criden spoke to Weinberg:

> WEINBERG: Now, you gonna lay those ground rules to Murph, right?
>
> CRIDEN: Oh, yeah. No problem.
>
> WEINBERG. OK.

* * * * * * *

> Weinberg: As long, you know, that the guy knows the ground rules, we don't want to have no. * * *
>
> Criden: . . . And I am gonna make sure he understands clearly. . . .
>
> * * * * * * *
>
> Criden: . . . I've got to coach these guys. I've got to make them feel at ease. I've got to you know, give them the bullshit.
>
> * * * * * * *
>
> Criden: . . . I gotta stroke him, you know, make him feel comfortable.
>
> Weinberg: They all got that problem, they're nervous.
>
> Criden: They're all nervous. You know, they all figure that maybe it's a set up, you know.
>
> Weinberg: Hey, you were nervous the first time, too.
>
> * * * * * * *
>
> Weinberg: Did you speak to him yet?
>
> Criden: I talked to him on the phone, and I set up an appointment, a luncheon. I set up to have lunch with him Friday in Washington. I'm gonna go down there and have lunch with him.[215]
>
> Weinberg: Thompson must have spoken to him, huh?
>
> Criden: Yeah, naturally. (*Thompson* Gov't Trial Ex. 12A, at 1–2, 4–5.)

The Select Committee questions the wisdom of the government's acquiescence in Criden's conditions. The Murphy meeting was the least explicit meeting captured on video tape. The ambiguity resulted in part from Murphy's extraordinary caution. In part, however, it resulted from Amoroso's having been too circumspect.

E. Allegations Regarding The Edward Ellis Episode

One of the events cited by former Assistant United States Attorney Edward J. Plaza to support his conclusion that Abscam involved "the creation of the illusion of criminality when perhaps criminality was not there" (Sel. Comm. Hrg., July 28, 1982, at 5 (testimony of Edward J. Plaza)), was a series of meetings and transactions in March 1979 with a New Jersey businessman named Edward Ellis. Ellis was seeking a $50 million loan to finance reconstruction of the Garden State Racetrack in New Jersey, in which he held an ownership interest. He contacted Abdul Enterprises through Weinberg, who arranged a meeting for him with the

---

[215] Murphy complains that the government approved the meeting with him and the offer of a bribe on incomplete and inaccurate information. The document seeking approval for Murphy was dated October 17, 1979, and represented that Criden had made the requisite assurances. (*See* [Deleted]) In fact, it appears that on October 17 Criden had not yet even spoken to Murphy. Criden testified that the first time he had spoken to Murphy was on October 19, 1979. (Sel. Comm. Hrg., Sept. 14, 1982, at 76 (testimony of Howard L. Criden).) The Select Committee has numerous reservations about the government's reliance on the uncorroborated word of corrupt middlemen like Criden (*see* pp. 68–77 *supra*) (the Select Committee also refuses, for reasons demonstrated throughout this report, to rely on the uncorroborated word of Howard Criden on any disputed issue), but concludes that Murphy was not injured by the misreliance in this case. As explained above, Thompson recruited Murphy.

Abdul Enterprises chairman, Jack McCloud (Special Agent McCarthy).

The meeting with McCloud was scheduled in two recorded telephone conversations between Weinberg and Ellis on March 1, 1979. In the first conversation Weinberg said that Ellis would have to tell McCloud that he had a politician who would assist the racetrack venture in return for a $100,000 bribe. (*See* [Deleted][216]) Ellis told Weinberg that he had several possible politicians in mind. ([Deleted]) Later that day Ellis told Weinberg that he had arranged for Alexander Feinberg to accompany him and that Senator Williams was involved. (*See* [Deleted]) Weinberg arranged to meet Ellis immediately before Ellis' meeting with McCloud "to make sure you [Ellis] know you got your story right on what to tell him [McCloud]." ([Deleted])

Ellis met McCloud on March 5, 1979, and told McCloud that he had already bribed Senator Williams through Feinberg and that Senator Williams, Feinberg, and Errichetti had agreed to assist the racetrack venture. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1498-500 (daily ed. Mar. 3, 1982).) On March 8, 1979, Errichetti, Weinberg, and DeVito met and subseqently were joined by Feinberg, who had been waiting downstairs. Weinberg recounted to Errichetti what Ellis had told McCloud about Feinberg and Senator Williams on March 5. Errichetti responded that he had told Ellis to mention Feinberg and Senator Williams to McCloud, that Feinberg was really Errichetti's front, and that Ellis hardly knew Senator Williams. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1502 (daily ed. Mar. 3, 1982).) Errichetti said, "He [Weinberg] said send somebody the fuck up here, remember? So Feinberg went up there instead of uh—another politician." ([Deleted], *reprinted in* 128 Cong. Rec. S 1502 (daily ed. Mar. 3, 1982).) Weinberg continued to suggest that they try to arrange for McCloud to pay off Feinberg or Senator Williams as Ellis had promised. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1502-06 (daily ed. Mar. 3, 1982).) Errichetti insisted that DeVito and Weinberg forget about the Senator, and Errichetti and Weinberg discussed whether Feinberg could be sent to McCloud to pick up the $100,000 and to share it with them without Williams' knowledge. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1502-06 (daily ed. Mar. 3, 1982).) DeVito responded that that was too risky, because McCloud might say something to Williams about the bribe, if he met him. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1502-06 (daily ed. Mar. 3, 1982).)

Feinberg then joined them, and Errichetti and Feinberg immediately began insisting that Ellis was crazy, that Ellis had nothing to do with Senator Williams, and that Errichetti and Feinberg together could take care of Senator Williams and ensure a favorable legislative climate for the racetrack. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1503-05 (daily ed. Mar. 3, 1982).) They told DeVito and Weinberg that Ellis' representations on March 5 had been untrue and unfair to McCloud and that, through the disguise of legitimate legal fees, they could handle what Ellis had proposed to

---

[216] The omission of a citation to a confidential document is identified by "[Deleted]." *See* pp. V-VI *supra*.

McCloud as illegal payoffs. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1503-95 (daily ed. Mar. 3, 1982).)

Plaza testified that, when he had begun working on Abscam in April 1979, he had been told that Senator Williams had been bribed to assist the Garden State Racetrack and that Plaza had been shown the video tape of the March, 5, 1979, meeting between Ellis and McCloud to support that claim. (*See* Sel. Comm. Hrg., July 28, 1982, at 27-28 (testimony of Edward J. Plaza).) Plaza explained that he had remained unaware of the March 1 telephone conversations and of the March 8 meeting, which had been recorded but not videotaped, until April 1980, when he had first received those tapes, which were not transcribed until after May 1981. (*See* House Jud. Subcomm. Hrg., June 2, 1982, at 11, 13 (testimony of Edward J. Plaza).)

Plaza drew three adverse conclusions from these taped conversations. First, he concluded, the March 1 tapes demonstrate that Weinberg had told Ellis, who had contacted Weinberg in search of financing for a legitimate venture, that Ellis would receive financing only if he could involve a politician in support of his project. Second, Plaza inferred that Weinberg had told Ellis that he need only convince McCloud that a politician was involved, even if one was not, and, possibly, that Senator Williams was the politician whose name Ellis should invoke. Plaza's final conclusion was that Errichetti and Weinberg had induced Ellis to make these false representations to McCloud in an attempt to create an opportunity for them to share between themselves the $100,000 McCloud believed he was paying as a bribe to Williams. (*See id.* at 8-9, 11-13; Sel. Comm. Hrg., July 28, 1982, at 26-27 (testimony of Edward J. Plaza); *see also Myers* D.P. Tr. 919, 1436 (testimony of Edward J. Plaza); *id.* at 2219-22 (testimony of Robert A. Weir, Jr.).)

The Select Committee has concluded that in all likelihood Ellis approached Weinberg to obtain legitimate financing and that Weinberg convinced him that the approval of a loan was conditional upon his securing the involvement of a politician. Further, Weinberg offered to advise Ellis which politicians would be acceptable, what participation would be required, and how Ellis should portray his involvement to McCloud. There is insufficient evidence to support Plaza's more serious accusations: that Weinberg told Ellis to deceive McCloud into erroneously believing that a politician had agreed to assist the racetrack project and that Weinberg told Ellis to convince McCloud that Senator Williams was the politician. The available evidence refutes Plaza's most serious charge: that Weinberg told Ellis to deceive McCloud as part of a conspiracy between Weinberg and Errichetti to defraud the government by siphoning off money supposedly going to bribe Senator Williams.

The existence of unrecorded conversations between Weinberg and Ellis and between Weinberg and Errichetti about Ellis, and the general untrustworthiness of Errichetti, Feinberg, and Weinberg render a precise reconstruction of the Ellis events impossible. Based on the taped conversations and interviews with Ellis, Errichetti, Weinberg, and Amoroso, however, the Select Committee has identified the most likely explanation of the Ellis incident. The only explanation that appears to reconcile the available evidence is that Weinberg attempted to induce Ellis to participate in a corrupt transaction, while Errichetti and Feinberg, unknown to Weinberg, were simultaneously attempting to use Abdul Enterprises to gain control of the Garden State Racetrack for themselves and to force Ellis out.

According to Special Agent Houlihan's interview of Ellis in October 1980, Ellis first heard of Abdul Enterprises as a potential source of financing from Errichetti in 1978 or early 1979. (*See* [Deleted]) Errichetti denied in testimony before the Select Committee that Ellis had met Weinberg through him and "guessed" that Feinberg had arranged the introduction. (Sel. Comm. Hrg., Sept, 15, 1982, at 101 (testimony of Angelo J. Errichetti).) At the *Myers* due process proceeding, Weinberg testified that he had met Ellis through Errichetti. (*See Myers* D.P. Tr. 4416.) Weinberg contradicted that testimony, however, before the Select Committee, where he testified that Ellis had been introduced to him through both Feinberg and another individual. (Sel. Comm. Hrg., Sept. 16, 1982, at 31 (testimony of Melvin C. Weinberg).) Both Errichetti and Feinberg have acknowledged that they had known Ellis for many years. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 101-02 (testimony of Angelo J. Errichetti); [Deleted]) Based on the lack of credibility of both Weinberg and Errichetti on other aspects of the Ellis events, Ellis' version seems more likely to be accurate.

The first recorded reference to the Garden State Racetrack appears to be contained in a tape of a telephone conversation on February 9, 1979, in which Errichetti said to Weinberg, "I got the race track thing * * * I'll bring that Monday." ([Deleted]) Ellis telephoned Weinberg and arranged for a meeting to be held later that month in West Palm Beach, Florida. (*See* [Deleted]) At that meeting Weinberg met Ellis and Ellis' partner, Bill Hyman, and told them that McCloud would deal only through politicians. (*See* [Deleted]) Ellis told Houlihan that he had told Weinberg that he had Errichetti as his politician, which Weinberg had found acceptable. (*See* [Deleted]) Weinberg testified that Amoroso had also been at this meeting. (Sel. Comm. Hrg., Sept. 16, 1982, at 35 (testimony of Melvin C. Weinberg).) Amoroso has testified that he never met Ellis. (*See Myers* D.P. Tr. 4188.) Weinberg denied having told Ellis that he would have to have a politician involved to get a loan; but Weinberg admitted having asked Ellis whether he had the "juice" to get a license as a condition of the loan. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 30-33, 40-41 (testimony of Melvin C. Weinberg).)

The next recorded contact between Ellis and Weinberg was on March 1, 1979, when Weinberg set up a meeting for Ellis with McCloud.[217] (*See* [Deleted]) Weinberg asked Ellis if he had done his "homework," as Weinberg had instructed in Florida. Ellis said that he had, but that he was not "sure exactly how to do it." Ellis stated that Errichetti "said absolutely go ahead," but had vetoed Ellis' selection for a politician—namely, Errichetti himself—to help him. (*See* [Deleted]) Ellis said that he had four other possibilities, but that he would have to get back to Weinberg on whom he was going to use. (*See* [Deleted]) Weinberg offered to help him decide which one to use and explained what Ellis should say when he met McCloud:

---

[217] It is not clear whether Ellis and Weinberg had any intervening direct contact; Ellis has recalled none. It appears that there was contact through Errichetti, whom Ellis told Weinberg on March 1 he had talked to in the interim ([Deleted]) and whom Weinberg said he had talked to the previous evening (*See* [Deleted]) Telephone toll records indicate that Weinberg telephoned Errichetti later the same day and spoke to him for six minutes. The call was not recorded. Errichetti testified that he believed that he had talked to both Ellis and Weinberg in this period, but he had no specific recollection of the conversations. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 102 (testimony of Angelo J. Errichetti).)

> Tell him, tell him the guy you got. . . . How much it's gonna cost. . . . And you say, put it this way to him, "It's gonna cost a hundred thousand." Right? . . . You want ten thousand dollars down, for the guy. . . . All right, he agrees to it; then you let the guy come out and meet Jack, and they'll talk together; and then he'll give him the thing, and then you're all set. ([Deleted])

Weinberg erroneously suggested to the Select Committee that, before the March 5 meeting, he had not known why Ellis wanted money or what Ellis would say to McCloud. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 32–34 (testimony of Melvin C. Weinberg).) When he was read the transcript of the March 1 conversation, Weinberg interpreted his remarks in a manner contradicted by the transcript. Weinberg maintained that he had not been telling Ellis to tell McCloud that the price would be $100,000 but that Ellis had proposed $100,000 and that Weinberg had said that McCloud would pay only $10,000. The March 1 conversation in fact demonstrates that Weinberg was the initiating force behind Ellis' subsequent representations to McCloud. In addition, however, Weinberg's instructions to Ellis to arrange a meeting between McCloud and Ellis' politician refute Plaza's contention that Weinberg was attempting to use Ellis to deceive McCarthy and to enrich himself: If Weinberg had wanted McCarthy to think a politician was to be paid off, when Weinberg and Errichetti in fact were going to keep the payoff money themselves, Weinberg would not have wanted McCarthy to meet with the purported bribe recipient, because the truth would have been too likely to be reported.

Later on March 1, 1979, Ellis telephoned Weinberg to identify the politician who would go with Ellis to meet McCloud. Weinberg reiterated the importance and the role of the politican:

> As long as you got somebody on your side that he knows . . . . [W]e got the guy coming and say, "Look, without me you can't build it; with me I get it built. I got, I get all them things passed." This is what he wants, and he, and then, uh, verify it and make sure he takes care of the guy. ([Deleted], *reprinted in* 128 Cong. Rec. S 1497 (daily ed. Mar. 3, 1982).)

Ellis told Weinberg that the politician would be Alexander Feinberg:

> He's the guy; he's Senator Williams', ah, man. And he's the politician in south Jersey. . . . He's Senator Williams', ah, ah, boy. . . . Alex has been in this Garden State deal all along. ([Deleted], *reprinted in* 128 Cong. Rec. S 1497 (daily ed. Mar. 3, 1982).)

Shortly after that conversation, Hyman, Ellis' partner, called Weinberg and asked whether Weinberg had heard Ellis' choice and whether that was satisfactory. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1498 (daily ed. Mar. 3, 1982).)[218] Ellis told the FBI in October 1980 that Errichetti had recommended that Ellis deal with Feinberg in the Abdul matter. (*See* [Deleted])[219] Given the consistency between Ellis' explanation and the three March 1 taped conversations, it appears that Errichetti proposed Feinberg to Ellis. Although it is possible that Errichetti and Weinberg had discussed the selection of a politician for Ellis on or before March 1, there is no evidence to support Plaza's accusation that Weinberg deliberately steered the selection to Feinberg in an attempt to incriminate Senator Williams or for any other reason.

Weinberg had arranged to meet Ellis one-half hour before his meeting with McCloud on March 5:

> HYMAN: Well, does he [Ellis] know now (inaudible)? I mean is he completely versed on what you told me?
>
> WEINBERG: Well, I'm meeting him at 9:30 in the morning, a half hour before. I'm going to go over it with him again.
>
> HYMAN: All right. Good. Because, you have to make sure he knows what he's, you know, what he, what he, what he's to say. ([Deleted], *reprinted in* 128 Cong. Rec. S 1498 (daily ed. Mar. 3, 1982).)

When the FBI interviewed him in 1980, Ellis said that in his meeting with Weinberg just before the McCloud meeting on March 5, Weinberg had continued to stress the importance of politicians. Ellis said that Weinberg had not told him to invent stories of past payoffs or to "bullshit McCloud." (*See* [Deleted]) There is no reason to disbelieve Ellis or to believe that Weinberg's unrecorded message to Ellis in the March 5 meeting differed significantly from his exhortations captured on tape on March 1. It does appear, however, that Weinberg's March 5 meeting with Ellis was the first instance in what later developed into a controversial pattern: Weinberg's coaching of suspects, immediately before a videotaped payoff meeting with FBI undercover agents, on how to behave. (*See, e.g.,* pages 232–34 supra (Williams); pages 188–89 *supra* (Myers).)

Weinberg denied having met Ellis beforehand to tell him what to say to McCloud and offered three explanations for his pre-meeting meeting with Ellis on March 5. The first two are plainly inaccurate. The third is simply not credible. First, Weinberg testified that Ellis had wanted to meet him. (Sel. Comm. Hrg., Sept. 16, 1982, at 41 (testimony of Melvin C. Weinberg).) The March 1 transcripts clearly demonstrate, however, that Weinberg, not Ellis, had requested the premeeting meeting:

---

[218] Apparently, Hyman telephoned Weinberg twice, but Weinberg recorded only one call. (*See* [Deleted])

[219] Errichetti testified that he had not told Ellis what to say to McCloud, but had only cautioned Ellis against being too optimistic about the loan. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 102–03 (testimony of Angelo J. Errichetti).)

> **Weinberg**: But I want to speak to you before time, you go in to see him to make sure, you know you got your story right on what to tell him. ([Deleted])

* * * * * * *

> **Weinberg**: Yeah, now I want to wait downstairs for you at ten. You'll be here at ten o'clock in the morning?
>
> **Ellis**: Yeah.
>
> **Weinberg**: I'll wait downstairs. Try and get here by about nine thirty and I'll sit down and talk to you, go over everything with you. ([Deleted])

Second, Weinberg said that he needed to meet Ellis "to make sure that he had the proper papers and everything else to bring up to show Jack [McCloud]." (Sel. Comm. Hrg., Sept. 16, 1982, at 41-43 (testimony of Melvin C. Weinberg).) But neither of the March 1 recordings of conversations between Weinberg and Ellis includes any mention of Ellis' taking any document to his meeting with McCloud on March 5. Further, there is no evidence that Ellis showed papers or anything else to McCloud on March 5. To the contrary, the transcript reveals that Weinberg promised to go over Ellis' financial package with McCloud at a later date and that Ellis offered to show McCloud photographs of the track at a later date. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1498-99 (daily ed. Mar. 3, 1982).)

Finally, Weinberg testified that "the main reason" for this premeeting was to ensure that Ellis was not accompanied by anyone who might have known McCloud as Special Agent McCarthy. (Sel. Comm. Hrg., Sept. 16, 1982, at 42-44 (testimony of Melvin C. Weinberg).) This explanation fails for two reasons. First, Ellis arrived to meet with McCloud alone, following Weinberg's March 1 statements to Ellis that Ellis would be meeting McCloud "one on one" and that he should "come by [him]self because he [McCloud] don't like to talk with too many people in the room." ([Deleted]) Second, even if Ellis had been accompanied, it is unclear how Weinberg could have discovered whether Ellis' companion had ever met Special Agent McCarthy. The falsity of Weinberg's three conflicting explanations thus belies his claim that he did not meet Ellis in order to coach him on what to say.

Weinberg introduced Ellis to McCloud and left the room. After a brief discussion of the conditions of, and prospects for, the racetrack, Ellis told McCloud:

> I got all the politicians. All the politicians are on my side. . . . I got, ah, Senator Williams, who is the, who is the key, key man. And this Alex Feinberg is his attorney and his, his bagman. But he, he's pushing, he's pushing the thing. . . . He's, he's on my side; and he's pushing it, and he's pushing, ah, through the state, through the state government. Errichetti's on my side. He's, he's the, he's, he's with me a thousand percent. ([Deleted], *reprinted in* 128 Cong. Rec. S 1499 (daily ed. Mar. 3, 1982).)

* * * * * * *

> And Williams is, is Williams has cost me a hundred thousand bucks, and. . . . And Alex is his, Alex is his bagman. . . . Alex is his bagman and, ah, ten, ten thousand bucks to, getting, get Alex straightened out and that'll, that'll do it. . . . Yeah, yeah, and he's, he's the bagman. Been the bagman for, for Williams; and, and he moves things; he moves things around. ([Deleted], *reprinted in* 128 Cong. Rec. S 1500 (daily ed. Mar. 3, 1982).)

Ellis told the FBI that the statements he had made to McCloud were factual, but that he did not know what he had meant when he had said that he had paid $100,000 to Senator Williams and was paying $10,000 to Feinberg. Ellis said that he never had bribed any politician and never had given any money to Feinberg or to Senator Williams, whom he said he had met only once. Special Agent Houlihan reported Ellis as having said that Feinberg had told him, "We're getting $100,000, and he might get $10,000." ([Deleted]) Houlihan reported that, the day after he had interviewed Ellis, Ellis had telephoned him to add that he had remembered that Feinberg had told him that it would cost $100,000 to get the financing and that Feinberg would get ten per cent of the money. Ellis had told Houlihan that Feinberg could have been referring to a legal transaction or to an illegal payoff. ([Deleted]) The similarity of Ellis' references to $100,000 and $10,000 in his meeting with McCloud and Weinberg's instructions on March 1 (and presumably on March 5) suggests that Ellis may have mistakenly attributed the source of those remarks to Feinberg's, rather than to Weinberg's, prompting. Another possibility is that Weinberg conveyed to Errichetti the same instructions he had given Ellis on March 1 and that Errichetti relayed them to Feinberg, from whom Ellis remembered having heard them.[220] In either event it is apparent that Ellis was doing what Weinberg had originally proposed to him as a condition of receiving a loan.[221]

The conclusion that Weinberg was inducing Ellis to involve a politician, while independently Errichetti was directing Ellis to use Feinberg as the politician, is supported by the March 8 meeting of DeVito, Weinberg, and Errichetti. The initial conversation that occurred when Weinberg raised Ellis' name on March 8 suggests that Errichetti had told Ellis to name Feinberg and Senator Williams; that Weinberg was trying to arrange a corrupt meeting of Feinberg, Senator Williams, and McCloud and was not attempting to deceive McCloud; and that Errichetti was attempting to prevent such a meeting, despite his directions to Ellis before March 5:

---

[220] On March 2, 1979, Errichetti and Weinberg had an unrecorded meeting. ([Deleted]) Although it may be assumed that Errichetti and Weinberg discussed Ellis ([Deleted]), McCarthy's memorialization of Weinberg's report of the meeting does not discuss Ellis. Telephone toll records reflect that Weinberg telephoned Errichetti on March 5 and spoke to him for eight minutes, but this occurred after Ellis' meeting with McCloud. The call was not recorded.

[221] Plaza observed that, instead of saying Williams *would* cost $100,000, Ellis had told McCloud that Williams *had* cost $100,000. Plaza suggested, "Apparently Ellis had gotten his lines mixed up during the course of the conservation and had indicated that he had already paid Senator Harrison Williams $100,000." (House Jud. Subcomm. Hrg., June 2, 1982, at 13 (testimony of Edward J. Plaza).) In fact, it appears that Ellis had misunderstood Weinberg from the beginning. Immediately after Weinberg had instructed Ellis on March 1 to tell McCloud that "it's *gonna cost* a hundred thousand," Ellis had repeated the scenario back to Weinberg, but he already had converted it to, "I'll tell Jack it *cost* a hundred thousand." ([Deleted])

Weinberg: I wanna meet with Feinberg.

Errichetti: He's downstairs.

Weinberg: Yeah, alright.[222] Now, the reason I want to meet with Feinberg is a friend, Ellis, had told Jack that Feinberg is the bag man for Williams and Williams is behind it, and they agreed to pay. Now, does Feinberg know about it?

Errichetti: No, Feinberg ain't nothing, he's my front, he's Williams' bag man, that's true.

Weinberg: Yeah.

Errichetti: That's what I told Ellis to say.

Weinberg: Oh.

Errichetti: Cause, you know . . . Feinberg's been so discreet over the years . . .

Weinberg: How can we arrange for him to put the money up?

Errichetti: I tell fucking Ellis what to do.

Weinberg: But he [Ellis] told him [McCloud] Feinberg's coming up to take it.

(Pause.)

Errichetti: How much?

Weinberg: A hundred grand, ten thousand dollars down.

Errichetti: And when you supposed to give it to him?

Weinberg: No, this is one of the reasons I wanted to speak to Feinberg; because as soon as he's ready. . . .

Errichetti: Feinberg ain't the guy. I just told Feinberg to go up there and accompany him because Pete Williams' man, no other reason. Ellis belongs to me (laugh) lock, stock and barrel.

Weinberg: Well, how we gonna work that, then?

Errichetti: Is Jack to give him the money, Feinberg?

Weinberg: Yeah, in fact, Jack wants to give it to Williams.

Errichetti: Oh, you can't do that.

Weinberg: Well, if he could arrange, he'd probably give Pete Williams twenty-five, if he could arrange it. Why don't you work on it, see what you can do.

Errichetti: (Inaudible) Ellis don't even know each other. They do, but they don't. He [Weinberg] said send somebody the fuck up here, remember? So Feinberg went up there instead of uh—another politician.

Weinberg: Well, did Feinberg accept it?

Errichetti: And give it to me?

Weinberg: No.

Errichetti: (laugh) Give it to us.

Weinberg: Well, won't he [McCloud] wanna give it to Williams, though? He needs Williams there?

Errichetti: Pete Williams?

Weinberg: Yeah.

---

[222] It may be inferred from Weinberg's response to Errichetti's statement—that Feinberg was waiting nearby—that Errichetti had previously told Weinberg that Weinberg could meet Feinberg on March 8. This inference is confirmed by Weinberg's comment to Feinberg later in the same conversation that he had "c[o]me down [to Atlantic City] to speak to you [Feinberg]." ([Deleted])

> **Errichetti**: No fucking way. Pete Williams, get him out of here.
>
> **Weinberg**: Why? He's dangerous?
>
> **Errichetti**: U.S. Senator?
>
> **Weinberg**: Yeah.
>
> **Errichetti**: You don't go handing money out to a U.S. Senator. I could probably hand it to Williams faster; then what the fuck do you need him [Ellis] for? ([Deleted], *reprinted in* 128 Cong. Rec. S 1502 (daily ed. Mar. 3, 1982).)

Errichetti testified before the Select Committee that he had lied when he had told DeVito and Weinberg that he had told Ellis to name Feinberg to McCloud. His explanation, however, was incoherent:

> Q: Now, at one point in that conversation I just read [quoted above], you said, "That is what I told Ellis to say." Did you in fact tell Ellis what to say to McCloud?
>
> A: I don't think so.
>
> Q: Why did you——
>
> A: Why did I—again, back to the ingratiating to the sheik, but I can do these things, coming on strong, pretending, saying, but not really having the abilities to control any of these people.
>
> Q: Mr. Errichetti, this conversation is not a conversation attended by McCloud.
>
> A: I understand. (Sel. Comm. Hrg., Sept. 15, 1982, at 104–05 (testimony of Angelo J. Errichetti).)

In addition to the incoherence of Errichetti's contention, his position is undercut further by his admission of the accuracy of his statement that Feinberg was sent to McCloud "instead of uh—another politician." Errichetti explained, in fact, that Feinberg had appeared in lieu of Representative [deleted].[223] (*See id.* at 107.) Errichetti claimed that arrangements for [deleted] to accompany Ellis had been made by Feinberg and had had nothing to do with him; but Errichetti did not explain how, if he had not been involved, he knew of the substitution of Feinberg for [deleted]. Although the precise division of labor between Errichetti and Feinberg is unclear, it is apparent that between them they accounted for Ellis' actions on March 5.

Weinberg continued to encourage Errichetti to try to arrange for a payoff with Feinberg and Senator Williams:

> **Weinberg**: Well, this guy [Ellis], when he came up here, he told him [McCloud] that Williams is the guy that's doing the whole thing. I know it was you.
>
> **Errichetti**: Hum, you know it was me.
>
> **DeVito**: He impressed Jack so much, that way——
>
> **Weinberg**: Jack believes it's Williams.
>
> **DeVito**: He oversold.
>
> **Errichetti**: He oversold (inaudible).

---

[223] There is no evidence that [deleted] ever knew anything about, or had any involvement with, these events. (The omission of sensitive information is identified by "[deleted]." (*See* pp. V–VI *supra.*)

> **Weinberg**: Is any way to let Feinberg go up there and get it or Williams go up and get it?
>
> **Errichetti**: Forget Williams * * * Is Alex supposed to know the arrangement?
>
> **Weinberg**: I understand he did.
>
> * * * * * * *
>
> **Weinberg**: Well, you oversold, because Jack actually believes he's gonna meet Williams.
>
> (Pause.)
>
> **DeVito**: Yeah, he thought he was gonna wind up giving Feinberg ten and then that was gonna go to Williams and that he was going to eventually meet Williams himself.
>
> **Weinberg**: 'Cause we know Feinberg's his bagman, so I thought it was for real. ([Deleted], *reprinted in* 128 Cong. Rec. S 1502 (daily ed. Mar. 3, 1982).)

Contrary to Plaza's characterization of this conversation, the transcript reveals that Weinberg and Amoroso were trying to convince Errichetti to set up a corrupt transaction and that *Errichetti* was proposing alternatives to deceive McCloud. Although Weinberg discussed sharing part of the proceeds, there is no evidence to support Plaza's allegation that Weinberg was actually intending to dupe McCloud (Special Agent McCarthy). Rather, the dialogue suggests that Weinberg was indicating acquiescence to Errichetti's proposal in an attempt to make a real payoff to Feinberg and Williams:

> **Errichetti**: I could arrange for him [McCloud] to meet Williams in that little office down there (inaudible).
>
> **DeVito**: Well, if he's not gonna—if he's not gonna give Williams any money, you better not arrange that, because he's liable to say something to Williams that he shouldn't say or do.
>
> * * * * * * *
>
> **Errichetti**: Oh Jesus, U.S. Senator; forget it.
>
> **DeVito**: Well, I'm glad we've gone over this, because otherwise he, you know, if we would've—
>
> **Errichetti**: First of all, most guys, they'd love to do it, but they won't get near it. That's why they would come to me or somebody. Say, "Mayor, we would appreciate it". . . .
>
> * * * * * * *
>
> **Weinberg**: Well if Feinberg accepts it, he gives it to Williams?
>
> **Errichetti**: If I tell Alex not to give it to him [Williams], he'll give it to me.
>
> **Weinberg**: Well, why don't you let him [Feinberg] give it to him [Williams], let him [Williams] have it. It makes Jack happy.
>
> **Errichetti**: Who knows.
>
> **Weinberg**: Let him [Williams] have it.
>
> **Errichetti**: The ten.
>
> **Weinberg**: Yeah, the ten.

> ERRICHETTI: What about the balance?
> WEINBERG: The balance we'll grab.
> ERRICHETTI: How we gonna grab it?
> WEINBERG: I'll arrange that. Once Jack thinks he's got him, he don't bother with it no more. At least the ten, then he's happy they're digging. ([Deleted], *reprinted in* 128 Cong. Rec. S 1502 (daily ed. Mar. 3, 1982).)

Thus, by telling Errichetti that once Senator Williams had taken a $10,000 payoff, it would be easy for them to skim the $90,000, Weinberg was, at the most, increasing the inducement to Errichetti for him to arrange for Senator Williams to accept a bribe. The transcript does not support the contention that Weinberg actually intended to share the $90,000 with Errichetti or, more importantly, that he intended to deceive McCloud in order to do so. Furthermore, this conversation was held in Amoroso's presence, requiring the assumption, to believe Plaza's allegation about Weinberg, that Amoroso also was conspiring with Errichetti to abuse his position for personal financial gain. The Select Committee rejects this intimation and concludes that Weinberg was behaving properly in this instance.

In the ensuing discussion, Errichetti appeared to consider Weinberg's proposal, but he warned:

> Alex is very secretive, very quiet. He and Pete Williams have a special relationship. It's common knowledge that he's his bagman, O.K. Now whether he shares or don't share, who the fuck knows? I don't know. ([Deleted], *reprinted in* Cong. Rec. S 1502 (daily ed. Mar. 3, 1982).)

Errichetti also began to hint of his interest in the racetrack venture and his true relationship to Ellis and Feinberg:

> ERRICHETTI: You see on the racetrack, Alex's got nothing to do with it. In fact, Alex was the opponent, was the attorney against Ellis. Ed Ellis is basically my guy. He's a fucking leech. He's known in the business as a whore. . . . Now what are we gonna get out of this fifty million to give to Williams?

* * * * * * *

> WEINBERG: Well, you gotta make a deal with Ellis. See, Ellis ain't too bright.
> ERRICHETTI: I know that, and you know that.

* * * * * * *

> ERRICHETTI: Let me ask you something. Why does the loan to Garden State—Would it put a hamper on things we're gonna do for Jack?
> WEINBERG: No, no.
> DEVITO: It wouldn't, except if he——
> WEINBERG: Except that he loses a little faith in, you know——
> DEVITO [continuing]: If he thinks he's giving Feinberg the ten that's going to uh——
> ERRICHETTI: Pete Williams.

> **DeVito**: To Williams and it's not going to him and he meets Williams and says something about it, you know, cause eventually you're gonna have to arrange for him to meet Williams, uh, and he says something about it you know, Williams throws him out of the fucking office, uh, gets up and walks away from him.
>
> **Errichetti**: Even, if he got the money, he wouldn't say anything, Williams.
>
> **DeVito**: Well, but, you know Jack. (laugh) What am I gonna tell you, right? You know him.
>
> **Weinberg**: You'll have to coax him when you meet him when he goes to see Williams to keep his mouth shut.
>
> **DeVito**: You know, you never know what he's gonna say and when he's gonna say it.
>
> * * * * * * *
>
> **Weinberg**: Now what are we gonna—when we speak to Feinberg, what are we gonna do with him? How can we work that out?
>
> **Errichetti**: I'm gonna tell him to grab the fucking ten. We don't know. I want to sit with him first by myself.
>
> **Weinberg**: You sit down, and you speak to him.
>
> **Errichetti**: I'll say, "Al, what's the arrangement here?" If he don't know nothing——
>
> **Weinberg**: (laugh)
>
> **Errichetti** [continuing]: Because I don't mind if he took the——if they did do it that way. (inaudible) Ten for Pete Williams.
>
> **Weinberg**: Give the fucking money.
>
> **Errichetti**: That's why I mean, give it to him. All right.
>
> **Weinberg**: See if we can work it out, all right? . . . ([Deleted], *reprinted in* 128 Cong. Rec. S 1502-03 (daily ed. Mar. 3, 1982).)

Errichetti again suggested that they set up McCloud and take the money themselves.

> I'm McCloud. . . . And you're Ellis, and you tell me that Feinberg is bag man for Kennedy. Then we'll fucking leave. I got the fucking money. What do I fucking need——([Deleted], *reprinted in* 128 Cong. Rec. S 1503 (daily ed. Mar. 3, 1982.)

When DeVito repeated that McCloud would expect Senator Williams to be involved, Errichetti became irritated that DeVito, Weinberg, and McCloud had believed Ellis' representation that Williams could assist with the racetrack:

> I'm the mother fucking guy. . . . Common sense, Tony. Listen for a minute. (inaudible) In order for you to make this thing fly, you need [state approval for] harness [racing] days, flat days, you need a little extra take from the state. Fucking Pete Williams is a United States Senator. He's got nothing to do with this. State Senator has to do with it—me. So I don't understand. ([Deleted], *reprinted in* 128 Cong. Rec. S 1503 (daily ed. Mar. 3, 1982)).

Finally, Weinberg proposed a compromise: that they find another politician who would accept a bribe in return for agreeing to support the track. (*See* [Deleted], *reprinted in* 128 Cong. Rec. at S 1503 (daily ed. Mar. 3, 1982).) Once again, however, Errichetti discussed the possibility of arranging a fraud, a situation in which he would introduce to McCloud a politician who in fact would have no idea that he had been touted as a person who would accept a bribe in return for his help on the racetrack venture:

> WEINBERG: So worse comes to worst, give him [McCloud] an Assemblyman, and just tell him you have the names mixed up.
>
> ERRICHETTI: How do I handle this if this guy [whom I bring in to McCloud] don't know what the fuck I'm talking about?
>
> WEINBERG: Lots of luck. (laugh) ([Deleted], *reprinted in* 128 Cong. Rec. S 1503 (daily ed. Mar. 3, 1982).)

A few minutes later, Feinberg joined DeVito, Weinberg, and Errichetti. From the moment Feinberg entered, he and Errichetti engaged in an attack on Ellis and a sales pitch for Abdul Enterprises to retain their services on behalf of the racetrack:

> ERRICHETTI: You [Feinberg] just happen to be the recipient of something that you have no fucking nothing to do with. That's for fucking openers.
>
> FEINBERG: I understand.
>
> ERRICHETTI: . . . Fucking Ellis. He's either got his names fucked up or he's fucking crazy, as we both know. And we all agree he's fucking crazy. What he said in essence, "Alex Feinberg, who represents Senator Williams, to make sure that the thing becomes a reality to laws passed to make the fucking thing fly." Now you know and I know it's fucking Angelo Errichetti that passed the [legislation permitting] two hundred days [of racing] (inaudible) whatever, O.K.? Now, I've got no problems. I do have a couple of problems concerning this. One, where he [Ellis] had said that he would give you [Feinberg] ten thousand dollars—— ([Deleted], *reprinted in* 128 Cong. Rec. S 1503 (daily ed. Mar. 3, 1982).)

Feinberg proposed that Abdul Enterprises pay for his influence, but that the payment be disguised as legal fees. (*See* [Deleted], *reprinted in* 128 Cong. Rec. at S 1504 (daily ed. Mar. 3, 1982).) Feinberg remonstrated against relying on Ellis and against making the payoff that Ellis had proposed to McCloud:

> No more fucking Ellis. Ellis is a horse's ass. He's a moron. He's an idiot. He knows that he doesn't have a . . . I want you to have a little confidence in me. Erric[hetti] and I are buddies. I've been through this. I have a lot of experience. . . . And I know all about these things, and I'll tell you if he [Ellis] dirties it up when he doesn't have to. It's the dumbest thing that he could possibly do. Leave McCloud to me. I'll explain to McCloud that the Senator [Williams] and I are very close friends. ([De-

leted], *reprinted in* 128 Cong. Rec. S 1504 (daily ed. Mar. 3, 1982).)

It is not surprising that the March 1, March 5, and March 8 series of conversations attracted the attention of Plaza and others. One week after Ellis had reported to Weinberg that he had Errichetti, Feinberg, and Senator Williams "on his side," Errichetti and Feinberg were telling Weinberg and DeVito that Ellis was crazy, that Ellis had nothing to do with Senator Williams or with Feinberg, and that Ellis' representations to McCloud had been unfair and inaccurate. The perplexity of these statements is compounded by Errichetti's contemporaneous admission, corroborated by FBI interviews of Ellis, that he had been responsible for Ellis' invocation of Feinberg and Williams.

Examination of the balance of the March 8 transcript suggests an explanation for Errichetti's and Feinberg's behavior. From their aggressive and sustained attempts to convince Weinberg and DeVito of their own importance, and of Ellis' uselessness, to the racetrack, it may be inferred that they had manipulated Ellis initially and had caused him to involve Feinberg so that Feinberg and Errichetti could try to convince Abdul Enterprises to lend them the money to take over the racetrack from Ellis. The recorded conversations demonstrate that Feinberg had been involved in other attempts to find financing to gain control of the racetrack, that he and Errichetti saw Abdul Enterprises as a new opportunity to do so, and that they had rehearsed their roles:

> FEINBERG: You're not gonna lend him [Ellis]. Let's get down to business. Let's do it my way; and I know what I'm doing. O.K., Mel? That's number one, and Ange[lo] knows I'm right. O.K., Angie?
>
> ERRICHETTI: Speak.
>
> * * * * * * *
>
> FEINBERG: Number two, now: I'm gonna be your friend and McCloud's friend. . . . Your boss doesn't wanna throw the money down the drain, does he? (inaudible) If you give this guy the money and just let him take the helm of this ship, you're gonna burn the fucking thing. . . . Now let me tell you what I have. Let me explain the position I'm in. I have a buyer in Philadelphia who has financial connections overseas and he's been on my ass about buying the track. He knows I'm here today. He knows I'm here, because I've got his permission to do so. And I said, "I'm sorry, Frank,"—his first name—"but Ellis has the deed to the property; he's in the key position where he (inaudible). All he has to do is put up his money and he's the—"
>
> ERRICHETTI: Ball game's over.
>
> FEINBERG: . . . "And the ball game's over. And I know that the people who have the money are gonna put it up for him, and they want me to get into the picture as a lawyer for a lot of local reasons; and I want your permission to do that, if that's so." He said, "You have my permission to go and act as a lawyer for this other group; and if they don't put up the money, then you come back to

me." I have talked to the bank. The bank said, "Don't deal with Ellis. You deal directly with us." They sent me the package and everything else that I would send overseas for the investors to look at, as the prospectus. I've got that under control, all right? I know all the right people. I know just exactly what I have to do. I represented the fucking track before it burned down. Is that right?

Errichetti: And who broke everybody's balls in the state of New Jersey?

Feinberg: I did and, oh, you did. He [Errichetti] did the fucking job.

Errichetti: I passed the fucking law.

Feinberg: He passed the law. As far as the legislative system turned, he's the guy that did it. . . . So what I said was this to my client. I said, "Now if we do buy this directly from the bank, my conscience tells me, Don't drown this poor bastard. Let's work it out so that he gets the contract to construct, or we'll work something out where he recoups his money." And my client said, "We'll even give him a small piece of the action, a small piece, a small percentage so he's not out altogether." . . . I brush that aside. I'm here with Erric[hetti] and you. You work with these people. How are you gonna lend if you're gonna lend the money? . . . If you're gonna let him [Ellis] run the track, then you're—then I'm telling you—I've got a chance to make a buck, and I'm not adverse to that. . . . If you're just gonna lend him the money, let him have the free hand, fuck it. You're waste—I'm telling you. I'm warning you, [if] you're going to him, you're throwing your money down the sewer. . . . What you have to do is to make a tentative arrangement where the stock is completely controlled by you people and where you must work out a plan. He [Ellis must] ha[ve] no control. . . . Make him, make him any fucking, fucking thing you want, but without no power to outvote you. You gotta be able to outvote him on everything. . . . You've got to control it. If you don't control it, you're killing yourself.

* * * * * * *

Errichetti: Now, I didn't wanna say anything until we came here, O.K.? Number one, Ellis is a jerkoff, O.K.? Anybody who would say that Pete Williams can do to make that track whole again, he's gotta be a fucking idiot.

* * * * * * *

Feinberg: I have a rapport with the bank. . . . And I'll be the one to deal with him [Ellis]. If he wants to deal with me, let him direct. He called me. He wanted to get his bucks. Now all of a sudden he's dropping me like I got (inaudible). I don't understand this guy. He's a fucking moron. I don't understand one goodamn thing. . . . He mentions Pete Williams, and, and it's not fair to McCloud, your boss. I'm telling you, I'll do what your boss wants to be done; but do it my way, for chrissake, or legitimate way.

Errichetti: Or, or think about buying yourself.

Feinberg: I'll take you to the fucking bank. And I may (inaudible) your fucking lawyer.

* * * * * * *

Errichetti: You know what you can do? It might be wise to put some money down. Then you can step the fuck in and say, "Wait a minute, Alex," I mean, "Jack, this thing's gonna fucking blow up. What the fuck do you wanna get out of this thing" (inaudible)?

* * * * * * *

Feinberg: I don't wanna get involved with that son of a bitch [Ellis]. . . . He's no friend of Williams. I'm not sure he ever met Williams, for chrissake. He might've met, and that's about all; but here's the guy [Errichetti] to do it. . . . Now if McCloud wants somebody to get what he has to get, I'm friendly with the racing commission. Here's the state senator [Errichetti]. He handles the legislation. I know all the people involved. I know the guy. I know Errichetti]. I dont't need him [Ellis], and Williams is my friend. If I need anything from Pete Williams, he [Ellis] can't do anything. He's [Errichetti's] the one that does it. That's bullshit [from Ellis]. He's [Ellis is] a liar. . . . I can do the thing legitimately; and don't worry about Pete Williams, because I look out for his interests. But for him, for Ellis, to bullshit McCloud, it's wrong. . . . ([Deleted], *partially reprinted in* 128 Cong. Rec. S 1504-05 (daily ed. Mar. 3, 1982)).

Finally, Errichetti and Feinberg had managed to steer the conversation to their own proposed role in Abdul Enterprises' financing of the racetrack:

Feinberg: [W]hat we gotta do is level with McCloud. . . .

Weinberg: Well, I don't think we should level with McCloud and tell him what happened, because he'll lose faith with Pete——

DeVito: I think you gotta do one of two things, either——

Weinberg: Well, I'll (inaudible) kill him [McCloud] with Ellis until——

Feinberg: Kill him with Ellis.

Weinberg: Kill him with Ellis.

Feinberg: And that we're gonna buy it ourselves, directly. . . . One thing for me, Mel.

Weinberg: Yeah.

Feinberg: I wanna be sure, of course, he's [Errichetti's] in. I wanna be sure I'm paid as a lawyer.

* * * * * * *

Weinberg: What we'll do is, you guys get a group of guys together to present it. Present it to me. I will give you a hundred percent finance. Build up the price, all right? (inaudible) You guys own it. I'll finance it.

Errichetti: Here's the plan of action, O.K.? When you [Feinberg] leave here, you go back, call the bankers. (inaudible) Don't make a fucking move until you and me talk to the bank president.

* * * * * * *

Weinberg: I recommend it; I put it on Jack's desk. He's got the final say, O.K? ([Deleted], *partially reprinted in* 128 Cong. Rec. S 1504 (daily ed. Mar. 3, 1982).)

* * * * * * *

Errichetti: Mel, we tie the whole ballgame up. Tie the whole fucking thing up, very simply, O.K.? He [Feinberg] goes back while I'm in here. You [Feinberg] tell fucking White and the rest of them, "Don't fucking make a move on that track. . . ." Now, me, you [Feinberg], and (inaudible) meet. I'll give the ground rules, say, "Look, you gotta sit down with these two guys [Weinberg and DeVito], and you start getting your financial statement together." You're [Feinberg is] the fucking attorney. Now, you're gonna go back to fucking McCloud with Pete Williams.

Feinberg: O.K.

Errichetti: You and Pete Williams and me, three of us. We'll give him all the fucking strength then. . . . Me, Senator Williams will handle the thing.

* * * * * * *

Feinberg: Can I tell you something, Mel? As far as clout is concerned—and I'm not saying it because he's [Errichetti's] here—he's got all the fucking clout in the world.

Weinberg: But I don't want him to bring his name in, because we're dealing with him already, and I didn't want his name on that.

* * * * * * *

Feinberg: . . . I know what I'm talking—he [Errichetti] knows I know what I'm talking—or I wouldn't be sitting here. I've been through this shit so fucking many times that (inaudible). I'm telling you now that the—Ellis is stupid.

Errichetti: We ain't going that way.

Weinberg: I told him he's an idiot.

Feinberg: Jesus Christ, I met with the guy.[224] Do you know what happened?

Errichetti: Fuck Ellis. Stop all this fucking bullshit. . . . What's gonna happen, the thing is gonna be squashed, unofficially. . . . Get rid of him. Say, "Look, here's a million dollars. Get the fuck away from me. Goodbye."

---

[224] Ellis had told McCloud on March 5 that he had met with Feinberg. (*See* [Deleted], *reprinted in* 128 Cong. Rec. S 1500 (daily ed. Mar. 3, 1982).)

> **Feinberg**: Well, if you want me to, then right in front of you, I'll talk to the president or the vice president of the bank, who's the head of the whole goddamned thing.
>
> * * * * * * *
>
> **Errichetti**: Let me talk to him. I'm gonna tell him you're representing this firm. . . . This way it's better that way . . . I'm gonna do the talking.
>
> **Feinberg**: He's gonna do the talking. I'm gonna get him on the phone and say, "Dick, I'm here with Mayor Errichetti. Wants to talk with you, O.K.?"
>
> **Weinberg**: I told you the guy is stupid.
>
> **Errichetti**: We say we can't let this thing go. This guy [Feinberg], this is the key. We can take it away from that guy [Ellis] and get our own group.
>
> * * * * * * *
>
> **Feinberg**: Now, let's, have we got our plan set? . . . To impress McCloud, I'll bring Pete Williams to sit down as part of our group, O.K.? Then we'll make him [McCloud] feel good, but you're [Errichetti is] the guy that's got the fucking clout.
>
> * * * * * * *
>
> O.K. Very good. Sounds great, but if you listen to me and listen to Erric[hetti], we'll handle this track the right way.
>
> **Weinberg**: Oh, yeah, yeah. That's why I came down to speak to you.
>
> **Feinberg**: This guy Ellis, I'm sorry, is such a horse's ass.
>
> **Weinberg**: Well, I told Jack that (inaudible). I said this guy [Ellis] opened up about ritzy names. I says he's gonna mention your [Feinberg's] name. That was in the meeting.
>
> * * * * * * *
>
> **Feinberg**: So he mentioned my name and he mentioned Williams. . . .
>
> * * * * * * *
>
> **Feinberg**: I wanna take care of Erric[hetti]. . . . Take care of Erric[hetti], and Erric[hetti]'s finder's fee is perfectly legitimate, O.K.? We'll find a hole in there somewhere for him, and he'll take care of whoever else he has to take care of, . . .
>
> * * * * * * *
>
> **Errichetti**: You got me and Pete Williams.
>
> **Feinberg**: That's all.
>
> **Errichetti**: The end of the fucking conversation. ([Deleted], *partially reprinted in* 128 Cong. Rec. S 1505–06 (daily ed. Mar. 3, 1982).)

Errichetti confirmed before the Select Committee that his actions in the Ellis episode had been motivated by his interest in benefiting financially from the Garden State Racetrack loan:

> I believe that my motive was one of saying, "I control" and told Ellis because he had to be my man versus being circumvented by them. I was trying to protect my interest with them so he wouldn't go around my back, meaning Ellis and Amoroso and Weinberg, having the opportunities without me. (Sel. Comm. Hrg., Sept. 15, 1982, at 105 (testimony of Angelo J. Errichetti).)
>
> * * * * * * *
>
> I think I was trying to insure the fact that there was no circumvention by those other two [Ellis and Weinberg]. I was letting them know that I knew that he [Ellis] was going up there [to McCloud]. . . . (*Id.* at 107.)
>
> * * * * * * *
>
> Q: Did you expect to get any share of the finances that would be used to finance the Garden State Raceway?
>
> A: Yes.
>
> Q: How did you expect that?
>
> A: By insuring that there would be no circumvention; that I would know what was going on, arranging for a loan that I was not the initiator of, so to speak. I was insuring that. (*Id.* at 108.)

It is not clear whether Weinberg and Amoroso understood how Feinberg had become involved and appreciated Errichetti's and Feinberg's plan to force Ellis out of the Garden State Racetrack. The plans to have Abdul Enterprises finance Feinberg's and Errichetti's consortium to rebuild the track appears never to have gone forward; however, it is not clear whether this resulted from a conscious decision by Amoroso and Weinberg to avoid the power struggle between Ellis and the Feinberg-Errichetti duo or whether Feinberg and Errichetti simply were too preoccupied with the titanium mine project and with other projects to be able to develop the track venture. In his interview with the Select Committee, Amoroso recalled little about the Ellis incident, but he indicated a vague recollection that he had refrained from proceeding with it because the March 8 conversation had suggested that Ellis' representations to McCloud had not been authentic.

In any event, transcripts of subsequent conversations in the spring of 1979 suggest that Weinberg stalled both Ellis and Errichetti-Feinberg on the Garden State Racetrack proposals. On March 19, 1979, McCloud and Bruce Bradley (Special Agent Brady) inspected the racetrack with Ellis and an associate of Ellis'. McCloud promised Ellis that he would consider the proposal. ([Deleted]) As had been arranged during the March 8 meeting, Feinberg arranged for Weinberg to discuss Ellis on March 23, 1979, with Senator Williams, who indicated that he did not know Ellis. Weinberg promised to schedule a meeting for all of them to "get together on it." ([Deleted]) Four days later, Weinberg told Errichetti that he had made an appointment with Ellis, "[j]ust to ease him out," by making him an offer and by using his financial difficulties as an excuse. ([Deleted])

On March 29, 1979, in a conversation with Weinberg, Feinberg raised the subject of the track. Weinberg said that he had told Ellis that Abdul Enterprises did not want to deal with him and that he was planning to offer Ellis money to get out. Feinberg said that, when Ellis had called him, Feinberg had told Ellis that he was representing other interests and could not represent Ellis. (*See* [Deleted]) On April 3, 1979, Errichetti introduced Weinberg to John Brunetti, who was in the racing business, to discuss the financing of the Garden State Racetrack and to propose that, rather than buying out Ellis, they "just wipe him out." (*See* [Deleted])

On April 19, 1979, Weinberg told Feinberg that he had met with Brunetti, who wanted to own a large share of the Garden State venture. Feinberg inquired whether Brunetti had objected to Feinberg's being counsel to the track and whether Weinberg could insist on that condition. (*See* [Deleted])

Abdul Enterprises' interest in Ellis and the Garden State Racetrack appears to have tapered off in late April and May. Although Feinberg, Errichetti, and Weinberg occasionally discussed plans for the track, they mainly described to each other instances in which each had avoided Ellis or had refused to return his telephone calls. (*See, e.g.*, [Deleted])

Thus, Abdul Enterprises' proposed financing of the Garden State Racetrack was never consummated either for Ellis or for Errichetti and Feinberg. Although it remains unclear whether this was by design or by accident, it does seem clear that Plaza's most serious allegations about the incident are unfounded. The Select Committee rejects the contention that Weinberg and Amoroso were involved in a plot to defraud the government and to split bribe proceeds. The Select Committee further finds that Weinberg was not trying to cause Ellis merely to create the appearance of corruption involving Senator Williams or anyone else, but was attempting to create an opportunity for an actual crime to be committed. It is likely, however, that in the Ellis case Weinberg first linked the financing of a legitimate business venture to the bribery of politicians; that he was instrumental in the design of the proposed criminal transactions; that he arranged a private meeting in which he coached the suspect on what to say in meetings with undercover agents; that he engaged in unrecorded telephone conversations and meetings with the suspects; and that he did all of the above on his own, without the knowledge or approval of the supervising FBI agents.

Moreover, it appears that government attorneys and FBI agents remained unaware of Weinberg's, Errichetti's, and Feinberg's roles in inducing Ellis' representations to McCloud (Special Agent McCarthy) on March 5, 1979, and of the falsity of those representations. Weinberg has acknowledged that he had not discussed with McCarthy or Good the substance of his March 1 conversations with Ellis, either before March 1 or between March 1 and March 5, 1979. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 33–34 (testimony of Melvin C. Weinberg).) Amoroso told the Select Committee that he believed that, before the Select Committee showed them to him, he had never seen the transcripts of the March 1, 1979, telephone conversations between Weinberg and Ellis and between Weinberg and Hyman. Amoroso also acknowledged that he had not communicated to McCarthy the substance of Feinberg's and Errichetti's admissions on March 8, 1979, regarding the falsity of Ellis' statements to McCarthy on March 5, 1979. (Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) The combination of Weinberg's unsupervised instigation of complicated scenarios and Amoroso's failure to document and to communicate to others the developments resulting from those plans created a distressingly high degree of risk for an undercover investigation. It was fortuitous that the results of the Ellis episode were not grave.

F. ALLEGATIONS REGARDING THE INVESTIGATION OF BOB GUCCIONE

Informant Melvin Weinberg's contacts with one individual in the course of Abscam were particularly sustained, overbearing, and unjustified by a prior reasonable suspicion. Because the individual, publisher and businessman Bob Guccione, resisted Weinberg's repeated inducements and pressure to become involved in a bribery conspiracy, the incident never became the direct object of a court's attention under either the entrapment doctrine or the "outrageous conduct" standard of the due process clause of the Fifth Amendment to the Constitution. Nevertheless, the Guccione events provide a chilling reminder of the risks imposed by lax procedures and inadequate supervision of an informant like Weinberg, by allowing him wide discretion in the targets he selects and in the scenarios with which he approaches those targets and by failing to replace him early in the undercover operation with an undercover special agent. They also sharply demonstrate the vital need for legislation codifying and clarifying the entrapment doctrine and for threshold requirements that must be met before a law enforcement agent or informant may offer an individual an opportunity to commit a crime.

Weinberg initially targeted Guccione without having first obtained articulable facts to support a reasonable suspicion of criminal activity. Then, Weinberg attempted to induce Guccione to commit a crime without any evidence of his having been predisposed to do so. Finally, Weinberg applied pressure by involving himself actively in Guccione's business affairs, by meeting with his business associates, and by manipulating his financial expectations. There is no evidence that, during this escapade by Weinberg, undercover agents were fully aware of its nature.

Guccione's name was first mentioned in Abscam on November 16, 1978, in a meeting among Weinberg, Jack McCloud (Special Agent John M. McCarthy), William Rosenberg, and William Eden. In the same meeting in which Eden first identified Mayor Angelo Errichetti as corrupt, Eden mentioned that Errichetti had brought Rosenberg and Eden an investment package for Guccione's proposed hotel-casino in Atlantic City. Weinberg then asked whether Errichetti was Guccione's "juice" in New Jersey, and Eden replied affirmatively. ([Deleted])[225] McCloud asked whether Guccione would have any problem getting a casino license, and Eden replied, "That's already cleared." ([Deleted]) Weinberg then speculated on

---

[225] The omission of a citation to a confidential document is identified by "[Deleted]." *See* pp. V–VI *supra*.

Guccione's support and concluded by suggesting that Eden give him Guccione's package. ([Deleted])

Thus, by November 16, 1978, without having met Guccione or Errichetti, Weinberg had requested Guccione's investment proposal from Eden. The sole basis for that targeting request was Weinberg's speculation that Guccione must have had illicit political support guaranteeing his project because "he's not a gambler" ([Deleted]) and because Eden had agreed with Weinberg's presumption that Errichetti was Guccione's "juice." As of November 16, 1978, Guccione had expressed no interest in, and presumably had never heard of, Abdul Enterprises, and he had exhibited no willingness to participate in criminal activity. Further, no middleman had said he could or would bring Guccione in for a corrupt purpose, and no middleman had said that Guccione would want to deal with Abdul Enterprises. Instead, Weinberg initiated the process of trying to involve Guccione in Abscam.

Eden introduced Errichetti to McCloud and Weinberg on December 1, 1978. In the context of a discussion about Errichetti's ability and willingness to ensure that a casino project financed by Abdul Enterprises would receive a gambling license, Errichetti stated, "Now as far as helping, like I said to you, that's no problem. I can do that. I've done it before. I've dealt with Guccione." ([Deleted]) After Errichetti had left, Eden and Weinberg discussed Guccione, and Weinberg stated, "I don't think Guccione's got the package. . . . You want my opinion? He's fronting for a Vegas group to get into Atlantic City. . . . And, uh, they didn't give him the bread yet for the package. The guy's looking for financing." ([Deleted]) Weinberg had no articulable facts on which to base these defamatory remarks.

Thus, as of December 1, 1978, Errichetti had hinted that he had engaged in previous corrupt transactions on behalf of Guccione. Neither Guccione nor Errichetti on behalf of Guccione, however, had expressed an interest in engaging in corrupt activity with Abdul Enterprises. Although FBI undercover agents had been present at the November 16 and December 1 meetings at which Guccione's name was discussed, there is no evidence indicating that, after those dates, FBI officials or agents attempted to corroborate Errichetti's and Eden's vague representations about Guccione or that FBI officials were informed of, or approved the selection of, Guccione as an investigative target in Abscam.

Guccione told the Select Committee that he had first met Errichetti in the fall of 1978 in Atlantic City, shortly after Guccione had bought a hotel there. He said that he had had only a few chance encounters with Errichetti over the next few months. After that interval, Guccione said, Errichetti had telephoned him to inquire whether Guccione needed financing for his casino project. Guccione said that he had responded affirmatively and that Errichetti had said that he had access to large amounts of Arab money for financing such projects.

On January 9, 1979, Errichetti introduced Tony Torcasio, a business associate of Guccione's, to McCloud. ([Deleted]) It is unclear whether Torcasio was introduced in connection with the proposed financing of Guccione's casino or as someone Abdul Enterprises could hire to assist with a casino that Abdul Enterprises would develop: Weinberg told Errichetti on February 7, 1979, that Abdul Enterprises was interested both in building a casino and in acquiring land and financing others' projects. ([Deleted]) Weinberg also told Errichetti that he had arranged a meeting with Guccione for February 9, 1979. ([Deleted])

Although there is no tape recording of such a meeting, Guccione told the Select Committee that Errichetti had brought Weinberg and another individual to meet with him in his home around early February. ([Deleted]) The other individual appears to have been McCloud. ([Deleted]) Guccione said that the meeting had involved the usual financial discussions he was having with many business brokers at the time, but that Weinberg had seemed particularly interested in whether Guccione was guaranteed to receive a casino license. Descriptions of this meeting in subsequent taped conversations confirm that the meeting occurred. ([Deleted]) On February 12, 1979, Weinberg asked Errichetti to find out "who's behind Bob Guccione." ([Deleted]) On March 5, 1979, Errichetti and McCloud discussed Guccione. McCloud asked whether Guccione was connected with organized crime and observed that Guccione "seems between the rock and the hard place" with respect to his financing needs. ([Deleted]) Errichetti replied that he had met with Guccione, who had denied any organized crime connections. Errichetti appeared to suggest that, if Guccione's associations were to interfere with obtaining a license, Abdul Enterprises should buy Guccione's casino site and build its casino there. ([Deleted]) In any event, four days later Weinberg and DeVito (Special Agent Amoroso) met with Torcasio and Babe Dinallo, a building contractor affiliated with Guccione's project, to discuss Guccione's proposal. Weinberg repeatedly asserted that after investigating Guccione Abdul Enterprises had found problems concerning his financial position, his organized crime connections, and his ability to receive a casino license. ([Deleted]) Torcasio and Dinallo disputed all of Weinberg's assertions. ([Deleted]) Weinberg still had no articulable facts on which to base his defamatory contentions. Weinberg concluded by promising to examine Guccione's financial statement further. Telephone toll records reflect that Weinberg telephoned Guccione on March 10, 1979. Guccione stated that Errichetti had invited him to Florida for the party on the yacht on March 23, 1979. ([Deleted]) Guccione said that he had been too busy to go and had sent Torcasio in his place. Guccione also said that he had become less enthusiastic about Abdul Enterprises by this point.

It appears that in late March Weinberg and Errichetti began making preparations to take over Guccione's project, presumably if, as Weinberg had claimed, Guccione proved unable to obtain a license. On March 22, 1979, Errichetti assured Weinberg that he controlled Dinallo and that Dinallo had agreed to join them if they bought Guccione's site. ([Deleted]) Errichetti also told Weinberg that Torcasio was unhappy with his situation and would agree to join their operation. Weinberg responded, "Well, I don't blame him [Torcasio]. I wanna kill the bastard [Guccione] myself, O.K?" ([Deleted])

Telephone toll records and recorded tapes reveal that, in late March and early April 1979, Weinberg began speaking frequently with Torcasio, Dinallo, and others, usually in order to make derogatory comments about Guccione. ([Deleted]) Weinberg told Torcasio and Dinallo that he was seriously considering buying Guccione's property ([Deleted]) and that he had learned from a source on the New Jersey Casino Control Commission that Guccione would be denied a license. ([Deleted]) They discussed a meeting between Weinberg and Guccione that was scheduled for April 5, 1979. ([Deleted])

On April 4, 1979, in a conversation with other investigative suspects, Weinberg requested derogatory information about Guccione, in preparation for their meeting the following day:

> I'd prefer he didn't get it [the license] . . . . That's why I got to figure a way to knock him out of the box . . . . Whatever you can get me on Guccione. Give me a call tonight. It's very important because I'd love to knock him out of the box, cause I can tie him up . . . . See what the grapevine, cause I been trying to find out and you hear so many goddamn rumors. ([Deleted])

There appears not to have been any follow-up conversation later that day. ([Deleted]) Weinberg told Errichetti on April 4, 1979, of his planned meeting with Guccione and said that he had called Guccione to tell him, "[I]f you want to get your loan, we gotta put it in front of the Board of Directors, and there are questions they want answered. . . ." ([Deleted]) Telephone toll records reflect that Weinberg had telephoned Guccione on April 3, 1979, and that they had talked for ten minutes, but Weinberg chose not to record the conversation.

On April 5, 1979, the meeting between Guccione and Weinberg was held at Abdul Enterprises' office on Long Island. The meeting was tape-recorded. ([Deleted]) Weinberg deliberately deceived Guccione about Guccione's business prospects in an attempt to manipulate him into agreeing to bribe a Casino Control Commissioner. Weinberg expressly conditioned approval of a loan upon Guccione's agreeing to engage in criminal activity. Weinberg continued to insist that Guccione agree to participate in bribery, even after Guccione had explicitly rejected the suggestion. Weinberg then attempted to alter Guccione's relationship with his business associates. After Weinberg questioned Guccione preliminarily about his business history, the following exchange occurred:

> WEINBERG: As long as I can explain to the Board of Directors, they don't give a damn who you're in bed with, believe me. They also realize, let me explain something to you, before I ask you the next question. They also realize, being in the gambling business, you're not stupid, that you gotta have the right people behind ya, or forget it. You're not gonna make it. They can rip you off too fast.
>
> GUCCIONE: Mel, I don't want to disappoint you, I hate to disappoint you. I know what you're getting at.
>
> * * * * * * *
>
> No way. Mel, let me, let me give you this. This is on the heads and the eyes of my children. I have five children, alright? On the eyes of my children I am not connected with anybody. I am totally my own man. I am 100 percent

> owner of all of my companies, I owe nothing to nobody, nobody sits on my back, nobody has any pull with me. No one and least of all anybody like that, who is likely to cause me problems in getting licenses and that sort of thing. ([Deleted])

Weinberg continued to inquire whether Guccione was connected with organized crime, and Guccione insisted that he was not and that he would not have any problems getting licensed. ([Deleted])

Finally, Weinberg stated, "[O]ne of the board members made a remark that he don't think you're gonna get your license." ([Deleted]) Weinberg continued falsely to claim adverse inside information, and Guccione responded, "Mel, believe me, it is not possible for them to deny me a license." ([Deleted]) Finally, Weinberg explicitly conditioned the loan upon Guccione's willingness to offer a casino commissioner a bribe:

> I'm even authorized to even go further and I'm telling it's between me and you, and if you want it, we'll do it. If you can (inaudible), we're willing to pay. We'll pay it. Not asking you to lay out no money, we'll pay it. (Inaudible) that we know we got [deleted].[226] If you can come to me and say, "We got [deleted]" I don't care what it costs, to guarantee your license, we'll give you the money. ([Deleted])

Guccione told Weinberg once again, "I assure you I'm gonna get it [the license]." ([Deleted]) Weinberg responded:

> Well, in case, just in case, if you can arrange it and it won't cost you nothing, don't cost you nothing. Meet with [deleted]. Alright? I think that the people you're dealing with got enough clout with [deleted] to guarantee it. ([Deleted])

Guccione stated directly, "You see I can't go in and ask [deleted] to guarantee somebody to get a license." ([Deleted]) After further fencing, and after an additional demand by Weinberg that Guccione give his manager, Torcasio, a more favorable contract ([Deleted]), Weinberg and Guccione arranged to meet again with Errichetti and DeVito. Weinberg promised that, if Guccione and Errichetti could convince DeVito that Guccione would receive a license, he and DeVito would recommend to the Abdul Enterprises board that they finance Guccione's project. ([Deleted])

Weinberg followed this performance with an orchestrated plan to sabotage Guccione to induce him to commit a crime. He immediately telephoned Torcasio and Errichetti's secretary and misrepresented Guccione's statements at their meeting, maligned him, and attempted to injure his relationship with Torcasio. ([Deleted]) Weinberg told Torcasio, "Ya know if we had something on him [Guccione] that we could pressure him would help. Ya got anything?" ([Deleted]) Weinberg suggested to Torcasio that they meet to "go over a game plan because, uh, the whole thing is for you." ([Deleted]) Weinberg told Errichetti's secretary that "we have to protect that Tony [Torcasio] . . . the only way I can see . . . that we can do something is we got to get something on him [Guccione] and hold it over his head, and then he's got to dance to our tune." ([Deleted]) The next day, April 6, 1979, Weinberg recounted to Errichetti his meeting with Guccione and concluded, "So you know I'd like to find something on this bastard we can throw him. . . . There has got to be something on him." ([Deleted])

---

[226] The omission of sensitive information is identified by "[deleted]". *See* pp. V–VI *supra*.

On April 9, 1979, Weinberg, DeVito, and Errichetti met to discuss plans for a meeting with Guccione scheduled for that evening. ([Deleted]) Errichetti reported that his inquiries had not yielded any organized crime connections on Guccione's part. ([Deleted]) Weinberg continued to attempt to undermine Guccione's position. First, Weinberg suggested that Abdul Enterprises buy the hotel and lease it to Guccione. ([Deleted]) After Torcasio joined them, Weinberg toughened his proposal: "When we get it, get it, do we knock him [Guccione] out of the box and take it over or what?" ([Deleted]) Later, Weinberg advised Torcasio to abandon Guccione and to accept another job that he had been offered, because Weinberg did not trust Guccione. ([Deleted]) Discussion ranged between the options of financing Guccione and of operating the casino without Guccione. Weinberg suggested, "The best way to punish him [Guccione], he doesn't get the fucking place built—that punishes more than anything else." ([Deleted])

It appears that the meeting with Guccione on April 9, 1979, was not held. Guccione told the Select Committee that he recalls having talked to Weinberg in this period and that he had been expected to go to Atlantic City to meet the sheik and other people from Abdul Enterprises. Guccione said that, when Weinberg had told him that the sheik was unavailable, he had cancelled the trip. On April 11, 1979, Weinberg told Dinallo that he wanted to loan Guccione the money, but that Guccione had been dilatory. ([Deleted]) Weinberg told Torcasio on April 25, 1979, that Abdul Enterprises intended to give Guccione the loan if he would agree to "do what we want him to do," including liberalizing Torcasio's contract. ([Deleted])

Guccione told the Select Committee that he had not met with anyone from Abdul Enterprises after April 5, 1979, and that he recalls virtually no contact after early April. Telephone toll records reflect that Weinberg called Guccione's telephone number on April 16, April 17, April 25, and April 30, 1979, but only the April 30 call lasted for more than one minute.[227]

The April 30, 1979, conversation between Guccione and Weinberg was recorded. ([Deleted]) Weinberg asked Guccione for additional financial documentation, which Guccione promised to send and indicated that he would be presenting the proposal to Abdul Enterprises' Board of Directors sometime in May. ([Deleted]) Weinberg told Guccione that he thought the Board would approve the proposal and that he would inform him of when it would be considered. ([Deleted]) The next day Weinberg told another potential casino broker that no decision had been made concerning the Guccione loan. ([Deleted]) Weinberg continued to converse with Torcasio through mid-June, but the final recorded salient mention of Guccione appears to have occurred on May 28, 1979, in a telephone conversation in which Weinberg told Torcasio to tell Guccione that "everything's done. All we gotta do is get the one guy [Casino Control Commission official] say they're gonna give it [the license] to him. . . . And then we'll be able to move ahead." ([Deleted])

---

[227] On April 25, 1979, Weinberg spoke only to Guccione's secretary. ([Deleted]) The same was presumably true of the April 16 and April 17 conversations.

The unsuccessful pursuit and manipulation of Guccione by the undercover operatives provides a glaring example of the risks posed to innocent citizens by the government's reliance upon unsavory informants and dishonest middlemen, when they are given wide latitude to develop scenarios and select targets of their investigation. Because Guccione resisted all inducements and pressure to engage in criminal activity, no criminal prosecution of him resulted. Nevertheless, Guccione was the victim of undue interference by Weinberg in his business associations, unjustified manipulation of his business prospects, and unreasonable targeting. Because of the risks to innocent citizens illustrated by the costs imposed upon Guccione, and because of the threat of the government's attempting to prosecute individuals who may succumb to such outrageous inducements, the Select Committee has recommended elsewhere in this report the creation of a statutory entrapment defense applicable in such circumstances and the codification of threshold standards for offering an individual an opportunity to commit a crime. (*See* pages 362–89 *infra.*)

V. MISCELLANEOUS ALLEGATIONS OF IMPROPRIETY

A. Leaks to the News Media

The covert stage of Abscam concluded on February 2, 1980. Simultaneously, massive leaks of information about the investigation occurred. Frequent and detailed press reports about the particulars of the operation appeared throughout the pretrial and trial stages of the prosecutions. Although no court has found that the leaks deprived any defendant of a fair trial, the unauthorized disclosures have seriously derogated from the beneficial results of Abscam by spawning accusations of FBI overreaching and of prosecutorial manipulation of the judicial process.

The Department of Justice commissioned an investigation, under the direction of Richard Blumenthal, former United States Attorney for the District of Connecticut, to determine the sources and causes of the leaks. Blumenthal was charged with investigating not only the Abscam leaks, but also those that had resulted from two other highly publicized FBI undercover operations, Pendorf and Brilab. Blumenthal's investigation was quite thorough. Hundreds of interviews were conducted; several employees of the FBI and of other components of the Department of Justice submitted to polygraph tests (although several others refused to do so); and sanctions were imposed against several law enforcement employees, albeit for relatively minor indiscretions unrelated to the most serious Abscam leaks.

The Select Committee has reviewed the public report and the more thorough confidential report prepared by Blumenthal. Based on that review and on its own far more limited investigation of the leaks, the Select Committee has considered several restrictive measures that might reduce the risk of some types of leaks in the future. Thus, for example, because the major Abscam stories based on leaks in February 1980 closely followed the structure of the memoranda prepared within the Department of Justice to analyze the prosecutability of the various cases, the risk of such leaks in the future might be reduced by further limiting the number of officials and lawyers within the Department of Justice who review such memoranda. At least one great cost of such a limitation, however, would be a reduction in the number and diversity of attorneys who contribute to an analysis of the strength and fairness of a proposed prosecution. Similarly, substantial costs would attend each of the preventive measures considered by the Select Committee.

Accordingly, the Select Committee concludes that the leaks did not result from any reasonably curable deficiency in the policies, practices or procedures either of the FBI or of any other component of the Department of Justice. Instead, the irreducible risk of harm to innocent citizens that will always attend a major undercover operation constitutes yet another reason for ensuring that the federal law enforcement agencies strictly adhere to all reasonable safeguards during the investigative stage of the operation.

B. ALLEGATIONS REGARDING INJURIES CAUSED BY JOSEPH MELTZER

One risk that inheres in many undercover operations is that unscrupulous individuals will learn of the undercover scenario being used and will adopt it, or elements of it, as a basis for a scheme to defraud innocent citizens. Joseph Meltzer's activities in connection with Abscam provide an example of this risk and suggest one way in which it may be reduced.

On May 22, 1978, Meltzer was convicted and was sentenced in Florida to 30 months in a federal prison. Within two weeks thereafter, he was working with Special Agent Gunnar Askeland of the FBI's Miami Field Office and operating a Florida business called H & J Realty, a front for an undercover operation known as Palmscam.

In June 1978 Special Agent Fuller of the FBI's New York Field Office called Agent Askeland, informed him about the undercover operation known as Abscam, and told him about Melvin C. Weinberg, who, although he lived in New York, spent much of his time in Florida. Fuller told Askeland that Weinberg was scheduled to meet an Abscam suspect known as Joseph Meltzer in Florida in the near future. (Sel. Comm. interview of Gunnar Askeland, Sept. 2, 1982; Sel. Comm. interview of Myron Fuller, Sept. 2, 1982.)

Askeland informed Fuller that Meltzer was helping him in another investigation. Askeland explained that Meltzer had contacted him in May or early June and had told him that a particular county commissioner within the Miami Field Office's jurisdiction was corrupt. Because Askeland recently had heard another criminal allegation about the same commissioner, he had opened an investigative file and had asked Meltzer to provide information on the commissioner's allegedly corrupt activities. (Sel. Comm. interview of Gunnar Askeland, Sept. 2, 1982.)

Askeland asked Fuller to cancel the scheduled meeting between Weinberg and Meltzer, and Fuller agreed. Fuller and Askeland finished their discussion by trying to ascertain how Meltzer and Weinberg had come in contact with each other. The agents ultimately concluded that the contact must have been made through Ron Sablosky, one of the organized crime figures Weinberg had brought into Abscam in its earliest days. (*Id.*)

Later in June, Askeland told Special Agent McCarthy about Meltzer's work with the FBI, told McCarthy that the operation was called Palmscam, and asked him to write a letter to Meltzer from John McCloud (McCarthy's Abscam alias) to help establish Meltzer's cover as a real estate expert. (Sel. Comm. interview of John M. McCarthy, Sept. 2, 1982.) On July 7, 1978, McCarthy wrote a letter on Abdul Enterprises stationery to Meltzer at H & J Realty. The letter expressed McCloud's interest in buying two pieces of real estate and stated, "I feel confident, Mr. Meltzer, that you will be able to handle the legal problems concerning the use of the land in the appropriate way." (*Jenrette* Def. Trial Ex. 80.)

The information provided by Meltzer regarding alleged criminal activities of the county commission did not result in any indictable offense. On August 22, 1978, the FBI closed Meltzer as an informant. For reasons explained below, the Select Committee has been unable to determine the basis for his termination.

During the period in which H & J Realty, the Palmscam front company, was being run by Joseph Meltzer, a Florida businessman named Herman Weiss was an employee of that company. Thereafter, beginning at least in September 1978, Herman Weiss and Melvin Weinberg had several conversations. In the course of one of those conversations, and in furtherance of the Abscam operation, Weinberg told Weiss that Abdul Enterprises had $400 million in the Chase Manhattan Bank in New York. He also told Weiss the position, although not the name, of the person who could be contacted at the bank by anyone who wanted to verify the company's financial status.

Beginning in late 1978, Meltzer allegedly used the Abdul Enterprises scenario and the Chase Manhattan Bank information in a scheme to defraud innocent citizens on the West Coast.[228] It is reasonable to infer, given the known connections among Weinberg, Weiss, and Meltzer, that Meltzer obtained from either Weinberg or Weiss sufficient information to conduct his fraudulent scheme using portions of the Abscam scenario.

Important to this report is whether the FBI learned of Meltzer's activities and, in order to avoid exposing the ongoing Abscam undercover operation, made an informed decision not to take the steps needed to stop him. Unfortunately, the Select Committee cannot provide a satisfactory answer to that question. The Department of Justice has refused to provide substantial relevant information about Meltzer's involvement in Abscam; his relationship with Weinberg; the basis for his use by the Miami Field Office; the reasons for his termination as an informant on August 22, 1978; the date on which the FBI learned of Meltzer's Abscam-related activities; the nature of the information obtained by the FBI in that regard; the steps, if any, taken by the FBI to prevent innocent victims from being defrauded; other measures that were available and that were rejected by the FBI; and the basis for the rejection of those additional measures. Indeed, the Select Committee has been unable to obtain sufficient information to determine whether the FBI made a knowing, intelligent decision, after a cost-benefit analysis, regarding Meltzer and his risks to Abscam.

---

[228] For testimony of Meltzer's victims about the alleged effects on their lives and fortunes, see House Jud. Subcomm. Hrg., Feb. 4, 1982; House Jud. Subcomm. Hrg., Apr. 1, 1982.

The stated basis of the refusal of the Department of Justice to provide, under any conditions, information regarding Meltzer's involvement in Abscam is the need to avoid prejudice to the government's defense of the civil cases filed against it by persons claiming to have been injured by the FBI's alleged failure to prevent Meltzer from defrauding them. The Select Committee finds that rigid position unjustifiable.

The Select Committee has reviewed the few documents provided by the FBI that touch upon this matter. In several taped conversations on November 1, 1978, among Weinberg, Meltzer, and Sablosky, Weinberg warned Meltzer against using Meltzer's information to defraud "somebody out of bread." (*Jannotti* Pre-trial D.P. Ex. 8A.) Weinberg later testified that agents of the FBI knew of those conversations. (*Jannotti* Pre-trial D.P. Tr. 7.22, 7.47-.49.) Weinberg also cautioned Weiss in several instances that Meltzer was untrustworthy with respect to financial dealings. Those conversations with Meltzer and with Weiss suggest that the FBI was concerned as early as November 1978 that Meltzer was misusing or was about to misuse his Abscam information. A document dated February 26, 1980, states, however, that the FBI's Miami Field Office first learned of Meltzer's criminal activity in August 1979.

Further, a document dated October 22, 1979, from the New York Field Office states in substance that any affirmative action against Meltzer would seriously jeopardize the integrity of Abscam. The latter document requested that no action be taken at that time and that all inquiries be directed to Special Agent Wilson and to Strike Force Chief Thomas Puccio. Another document, bearing the date of September 14, 1979, referred to a San Diego report that there had been approximately 20 Meltzer victims and losses of over $200,000.

The information obtained by the Select Committee does not indicate that the FBI ever used or intended to use Meltzer in the Abscam operation and does not indicate that any special agent directly provided Meltzer with any critical information about Abscam. The Select Committee recognizes that a Meltzer-type escapade may be a risk that inevitably accompanies use of the undercover technique. The Select Committee also acknowledges that there will be occasions when the societal benefits of continuing an ongoing operation outweigh the costs to innocent citizens victimized by a Meltzer-type scheme. In Abscam and Palmscam, however, the risk could have been, and in the future should be, reduced by avoiding the commingling of assets, agents, and informants in discrete, but contemporaneous, undercover operations. Also as stated elsewhere in this report, the Select Committee finds that the allegations of harm caused to innocent citizens by Meltzer demonstrate that under appropriate circumstances the contemplated costs of an undercover operation should include reimbursement to innocent victims. (*See* pages 389–96 *infra.*)

C. ALLEGATIONS REGARDING STRIKE FORCE CHIEF PUCCIO'S RELATIONSHIPS WITH WRITERS AND PUBLISHERS

Abscam Defendants Thompson, Murphy, and Williams have alleged that during the Abscam prosecutions prosecutor Thomas Puccio had an undisclosed personal financial stake in the outcome of the prosecutions. (*Thompson* Def. Appellate Brief 139–47; *Murphy* Def. Appellate Brief 90.) Puccio, who was the principal Department of Justice attorney in charge of advising the FBI agents during the investigation, and who prosecuted Senator Williams and Representatives Lederer, Murphy, Myers, and Thompson, was a friend of Jack Newfield, a reporter for the *Village Voice,* throughout the Abscam investigation and prosecutions.

At the time of the Abscam trials, and even before the indictments had issued, Newfield had a contract to write a book about Abscam. (*Myers* D.P. Ex. 111.) The contract contained a clause providing for a collaborator for Newfield, although no collaborator was named in the contract. The contract, which referred to the subject matter of the book as "Project X," provided for substantial payments to the unnamed collaborator, if one were to be chosen.

If the allegations of Puccio's hidden interest were true, he would be guilty of violations of Standard Three of the American Bar Association Standards Relating to the Administration of Criminal Justice; of Canons Five, Seven, and Nine of the American Bar Association Code of Professional Responsibility; and, possibly, of the same criminal conflict-of-interest statutes under which he prosecuted the Abscam defendants. (*See* 18 U.S.C. § 203 (1976).) In addition, such a serious ethical breach would bring into question the fairness of the trials Puccio prosecuted and, by implication, the fairness of the entire investigation.

After reviewing the evidence, the Select Committee finds that Puccio did not have the alleged conflict of interest, had no undisclosed financial interest in the outcome of the prosecutions, and committed no breach of his prosecutorial responsibilities in this regard. The Select Committee thus agrees with the applicable conclusions of United States District Judge George C. Pratt, who heard testimony from Puccio and Newfield on this issue. (*United States* v. *Myers,* 527 F. Supp. 1206, 1237–39 (E.D.N.Y. 1981) *aff'd,* 692 F.2d 823 (2d Cir. 1982).)

1. Puccio's Initial Testimony

The issue of Puccio's involvement in any book writing first arose in the consolidated due process hearing held by Judge Pratt in January and February of 1981 in conjunction with the cases of Representatives Lederer, Murphy, Myers, and Thompson. The lawyers for Congressman Murphy called Puccio as a witness to ask him about his involvement in Newfield's proposed Abscam book. Puccio testified that he was aware of Newfield's contract to write a book about Abscam, but that he did not know when Newfield had entered into that contract. (*Myers* D.P. Tr. 4434.) Puccio said that he had not talked with Newfield about possible collaboration by the two of them on that project. (*Id.*) All of the defendants then rested their cases.

After defense counsel and Judge Pratt had begun discussing some final procedural matters, Puccio addressed the court, stating:

> Judge, if I just may in reference to that last question of Mr. Buffone asked me, although I haven't—just reflecting on it. Although I haven't any discussion relative to getting involved in a present project of Mr. Neufield's [sic], I have been offered the opportunity, if I wished to, to get involved in a book project. I just thought I would make that clear. (*Id.* at 4436.)

Puccio was then recalled to the stand and testified more completely about his knowledge of an involvement with the book. At the *Myers* due process hearing, and in subsequent testimony at the *Williams* due process hearing and before the Select Committee, Puccio has maintained that he had no actual interest in the book. He and Newfield had discussed the possibility of collaborating on a book at some future time, but it had nothing to do with Abscam. When Abscam went public, Puccio was offered the opportunity to write a book, but told both Newfield and Newfield's agent, Esther Newberg, that he could not discuss it while he was still employed by the government.

2. *The Origins of the Book Project*

Newfield and Puccio are close friends and have been so for several years. They first became friends in 1976, and the friendship deepened in 1978, when both Newfield and Puccio became fathers. (*Wms.* D.P. Tr. 665.) In August 1979 their families vacationed together at Martha's Vineyard. (*Id.* at 666.) During that vacation, Puccio and Newfield discussed their respective futures. Newfield, who, in addition to being a reporter on the *Village Voice* had also written several books, asked Puccio in a speculative way if he wanted to collaborate on a book. (*Id.* at 668–69.) Both Newfield and Puccio testified that the proposed book had nothing to do with any particular case. (*Id.* at 668, 531.) Rather, it would have dealt with questions and problems of law enforcement and prosecution from the perspective of a former strike force chief. Puccio made it clear to Newfield that he would not be interested in collaborating until after he had left government service; and Newfield testified that, at the time of their conversation, he had not expected to work on the book in the immediate future. (*Id.* at 670.)

Sometime after that vacation, Newfield contacted his literary agent, Esther Newberg. In September or October of 1979, Newberg, Newfield, and Puccio dined together and discussed whether there would be any public interest in a book along the lines contemplated by Puccio and Newfield. Newberg said she thought not, and the matter rested. (*Id.* at 529–31, 676.)

During this entire time, Puccio was overseeing the Abscam investigation, unbeknownst, he has testified, to either Newfield or Newberg. On February 2, 1980, the covert phase of the investigation ended, and news stories called Abscam the biggest scandal since Watergate. Puccio was mentioned as an important official in charge of the investigation.

Shortly thereafter, Newberg, who knew of Puccio's connection to Newfield as a result of the earlier dinner, called Newfield to see if Puccio would be interested in participating in an Abscam book. (*Id.* at 667, 679-80.) Newfield called Puccio in February or March of 1980 and told him of Newberg's offer. Puccio said he could not discuss the matter and told Newfield that neither Newfield nor Newberg could make any representations on Puccio's behalf or tell anyone that he would participate on a book. (*Id.* at 680.)

Sometime in late winter or early spring of 1980, Puccio talked on the telephone with Esther Newberg. Puccio testified that he thought he had called her, but he was not sure. He wanted to clarify to Newberg, since she—rather than Newfield—would be talking to any publishers, that Puccio was not a party to, and could not be a party to, any book by Newfield concerning Abscam. (*Id.* at 532-35.)

3. The Contract

Newfield signed a contract, with the publishing house of Putnam, dated March 27, 1980. (*Myers* D.P. Ex. 111.) Newfield testified that the contract was drafted and negotiated by Newberg and by Victor Temkin at Putnam. (*Wms.* D.P. Tr. 688.) Newfield did not read it carefully, but signed on the advice of Newberg. (*Id.* at 694, 724.)

The subject matter of the book, for reasons not made clear by the evidence, is specified in the contract as "Project X." Newfield testified that, on the basis of his prior experience with publishing contracts, this was unusual. (*Id.* at 743-47.)

Paragraph 30 of the contract calls for the possibility of an unspecified collaborator's being added to the contract. Without the collaborator, Newfield was to receive an advance of $40,000. With a collaborator, the total advance would rise to $100,000. Newfield testified that the collaborator clause was non-binding and that the proposed collaborator would have to have been acceptable to both Putnam and Newfield. (*Id. at* 713.) According to Newfield, he did not discuss with the publisher who the collaborator might be, although he would not have been interested in anyone other than Puccio. (*Id.* at 713-14, 721.)

4. Puccio's Awareness of the Contract

Puccio testified at both the *Myers* and *Williams* due process hearings that he was aware that Newfield had negotiated a publishing contract and that the contract provided for a potential co-author who would receive substantial sums of money. (*Myers* D.P. Tr. 4444; *Wms.* D.P. Tr. 539.) At the *Myers* due process hearing in February 1981, there was no indication of when Puccio learned of the contract. At the *Williams* hearing, both Newfield and Puccio testified that Newfield had shown Puccio the contract in January 1981, after the trials of Myers, Lederer, Thompson, and Murphy had concluded. (*Id.* at 536, 695.)

Puccio and Newfield also testified that they had been together on a social occasion when Newfield had shown Puccio the contract. (*Id.* at 537, 695.) Newfield was not sure whether he wanted to commit himself to the task of writing a book about Abscam, and he wanted a better sense of Puccio's future intentions. (*Id.* at 695-96.) Puccio testified that there had been no discussion in January 1981 about the identity of the contract's proposed co-author, but that it had been obvious who the co-author was supposed to be. (*Id.* at 539.)

The testimony of Puccio in both proceedings and of Newfield is largely consistent, with one exception. In the *Myers* hearing Puccio testified as follows:

> Q: There's never been any discussion between you and Mr. Newfield or Mr. Newfield's agent or any of the officials at Berkley or Putnam Press about your possible collusion as that coauthor or collaborator?
>
> A: It may have been discussed by them, but not by me.
>
> Q: Was their discussion with authority, your approval?
>
> A: Yes. (*Myers* D.P. Tr. 4444.)

The implication of that last answer is that Puccio authorized either Newberg or Newfield to use his name in discussing the Abscam book. According to his *Williams* due process testimony, however, he told both Newfield and Newberg not to use his name with any publisher. Given the otherwise consistent account, it appears that Puccio did not mean to imply by the quoted language that he had authorized anyone to negotiate a contract on his behalf; rather, at the most, he had approved of Newfield's preliminary conversations with Newberg and had told both of them not to use his name in negotiations with possible publishers. From all the evidence it appears that Puccio himself had nothing to do with the contract, had no control over the other parties, and could not prevent them from using his name as a *potential* collaborator.

5. Puccio's Select Committee Testimony

During the course of his testimony before the Senate Select Committee on July 27, 1982, Puccio basically confirmed his prior testimony about Newfield and the proposed Abscam book. Puccio told the Committee that Newfield had contacted him in February or March 1980 about doing a book and that Puccio had told Newfield that he could not discuss it because of the pending cases. Puccio said that his impression had been that Newfield had thought he could eventually persuade Puccio to contribute and that he, Puccio, had not ruled out the possibility. Puccio noted that the trend has been for participants in celebrated cases eventually to write books about them. (Sel. Comm. Hrg., July 27, 1982, at 97–101 (testimony of Thomas Puccio).)

Puccio did testify that he has been thinking about writing a book and that he has been in contact with a literary agent, Sterling Lord, about the possibility. Of course, there is nothing improper about his writing a book now; his involvement in the Abscam cases is over, and he has left government service. (*Id.* at 101–05.)

6. Brady *Violations*

Representative Thompson alleges that Puccio's failure to disclose the existence of the Newfield contract before trial was a violation of the government's obligation under *Brady* v. *Maryland,* 373 U.S. 83 (1963), to disclose to the defendants exculpatory information in the government's possession. He argues that, since it was obvious that Puccio would be called as a witness once the issues of entrapment and government overreaching were raised, Puccio's financial interest in an Abscam book was exculpatory. (*Thompson* Def. Appellate Brief 156–57.)

The Committee finds that the evidence outlined above did not constitute exculpatory information. The Committee finds that Puccio was unaware of the contract until after the trials of all defendants except Senator Williams had been concluded. The Committee also believes that Puccio had no financial interest to disclose. He knew that his friend had offered to write a book about Abscam with him. He had no present intention to write such a book and no enforceable obligation or right to participate in Newfield's contract with Putnam. The mere fact that Newfield and Newberg had approached Puccio and that he was somewhat interested cannot reasonably be construed as information tending in any way to exculpate any Abscam defendant.

D. Allegations Regarding the Memorandum of January 6, 1981, by Deputy Assistant Attorney General Nathan

William W. Robertson, a former United States Attorney for the District of New Jersey, has alleged that a memorandum written by former Deputy Assistant Attorney General Irvin B. Nathan, approved by former Assistant Attorney General Philip B. Heymann, dated January 6, 1981 ([Deleted]), and disseminated to Abscam defense counsel shortly after that date is "slanderous" and, "to the extent that it purported to communicate the information that [Edward J.] Plaza and [Robert A.] Weir had set forth in their December 17, 1980 memorandum, was defective to a degree bordering on intentional deception." (House Jud. Subcomm. Hrg., Sept. 16, 1982 (written statement of William W. Robertson at 35).) Robert J. Del Tufo, Robertson's predecessor as United States Attorney for the District of New Jersey, has not expressly challenged the accuracy of the Nathan memorandum's summary of the Plaza-Weir December 17 memorandum, but he has characterized the Nathan memorandum as "a premeditated effort to harm the reputations and credibility of New Jersey prosecutors." (House Jud. Subcomm. Hrg., Sept. 16, 1982 (written statement of Robert J. Del Tufo at 20).)

The Select Committee finds that those and similar criticisms of the Nathan memorandum oversimplify a complex situation and overstate the negative aspects of the conduct of Heymann and Nathan with respect to that memorandum. In fact, the actions of Heymann and Nathan with respect to the Nathan memorandum were in part commendable and in part unjustifiable.

On December 17, 1980, Plaza and Weir, both of whom were Assistant United States Attorneys, sent to Heymann, Robertson, and Charles F. C. Ruff, United States Attorney for the District of Columbia, a 14-page memorandum written by Plaza and Weir at the request of Robertson, their immediate supervisor. The authors stated in their memorandum that their purpose was to inform the addressees of the existence of six recording tapes and two FBI memoranda describing conversations that had occurred in the covert Abscam investigation and to urge that those eight documents "be furnished to all those judges who have presided over ABSCAM prosecutions." (*Myers* D.P. Ex. 4, at 1, *reprinted in* 128

Cong. Rec. S 1480–82 (daily ed. Mar. 3, 1982).) The memorandum also described information that the authors believed to conflict with some testimony given by government witnesses in prior Abscam proceedings, but the memorandum did not expressly urge that this information be furnished to courts or to defense counsel. The testimony related to three matters: (1) prosecutorial instructions given to Weinberg regarding the coaching of witnesses; (2) monetary compensation paid to Weinberg by the government; and (3) gifts received by Weinberg from Abscam defendants and suspects.

The Nathan memorandum, addressed to Heymann, noted that three of the six tapes referred to by Plaza and Weir had already been provided to some defense counsel and recommended that the other three be provided to some defense counsel, despite Nathan's having been informed by Thomas Puccio that the tapes "contain nothing remotely exculpatory." The memorandum also recommended that the two FBI reports not be produced unless the authors were about to testify, because Nathan had been informed by the Brooklyn Strike Force that the documents did not contain exculpatory material. The memorandum then summarized the principal contentions of the Plaza-Weir memorandum, juxtaposed a summary of the responses given to Nathan by Puccio as to each contention, and concluded by recommending that "we provide the substance of this memorandum to all defense counsel."

The Nathan memorandum accurately summarized the material contentions of the Plaza-Weir memorandum, with one possible exception: the Plaza-Weir memorandum claimed that Weinberg had made a particular statement at a meeting attended by eight persons, and the Nathan memorandum stated, "Weinberg and others present deny [that Weinberg made the statement]." The word "others" can be construed to mean "all others" or "some others," and it is a fact that only some others made the denial asserted by Nathan. The ambiguity was unfortunate, but the Select Committee has no evidence that the imprecision was intended to mislead. To the contrary, given the otherwise accurate nature of Nathan's summary of the contentions, given that the Nathan memorandum named all of the participants in the meeting, so that any misrepresentation of their recollection was sure to be discovered, given Nathan's adamant denial of any intention to mislead, and given that several career officials and prosecutors in the Department of Justice reviewed the memorandum prior to its dissemination, the Select Committee finds that the word "others" was not intended to mislead anyone. Moreover, the Select Committee has no evidence that the use of that word did mislead any court, any defense counsel, or any other person.

The Select Committee finds that the decision by Heymann and Nathan to furnish to defense counsel the six recording tapes, despite their belief that three of the tapes were not exculpatory, was commendable. The Select Committee further finds that the decision by Heymann and Nathan to furnish to defense counsel the substance of the various Plaza-Weir contentions was commendable, especially in view of Heymann's and Nathan's belief that the contentions were not exculpatory and in view of the fact that the Plaza-

Weir memorandum did not expressly urge that the information be furnished to defense counsel.

Because the Plaza-Weir memorandum is in the form of an internal evaluation by prosecutors of transcripts of judicial proceedings and of other prior events (as opposed to, for example, a tape recording of a meeting or notes taken at a meeting), the Select Committee finds that Heymann and Nathan had no obligation to inform defense counsel of the factual allegations contained in that memorandum by furnishing to defense counsel the memorandum itself. Rather, it was proper for Heymann and Nathan to inform defense counsel of the material factual allegations in the Plaza-Weir memorandum and of the material information needed to enable defense counsel to pursue the matter by examining the persons whose recollections were being relied upon and by obtaining relevant documents that might constitute evidence, rather than a mere subsequent lawyerly characterization of evidence. Moreover, even assuming that Heymann and Nathan had an obligation to furnish to defense counsel the substance of the Plaza-Weir allegations, an obligation that Heymann and Nathan did not believe they had, the obligation to provide an accurate summary of the material allegations did not preclude them from simultaneously providing the government's view of the validity of those allegations.

Unfortunately, however, Heymann and Nathan did not furnish to defense counsel and to the courts only the Plaza-Weir contentions; they also furnished the prefatory portion of the Nathan memorandum, which stated a very one-sided view of the background of the Plaza-Weir memorandum, characterized Plaza and Weir in highly unfavorable terms, and ultimately stated that they had been taken off the Abscam cases assigned to them because "very little, if any, work had been done on those cases." None of that prefatory material should have been volunteered to courts and defense counsel. It easily could have been excised from the Nathan memorandum, or an abbreviated version of the Nathan memorandum could have been prepared.

The decision to publish the prefatory material was especially unjustifiable because that material included the statement that "very little, if any, work had been done" on the cases assigned to Plaza and Weir. In fact, Plaza and Weir had done a substantial amount of work; but, by failing to convene an investigative grand jury, they had not taken a major step that Heymann and Nathan had thought appropriate. In retrospect, it is true that the convening of an investigative grand jury by the successors to Plaza and Weir on those cases resulted in the obtaining of some of the evidence that Plaza and Weir had been unable to obtain without the assistance of a grand jury, and it may be that those cases, including the various defenses, could have moved toward disposition—either prosecution or dismissal—more quickly had an investigative grand jury been convened in May or June of 1980. But Plaza's and Weir's failure or refusal to proceed in the manner preferred or directed by their superiors in the Department of Justice did not justify the publication of the erroneous statement that those two prosecutors had done little, if any, work on their cases.

It is important, in the Select Committee's view, that internal criticisms of government attorneys by their superiors not be publicly aired, except in compliance with a judicial or Congressional request or demand. The same fear of creating a chilling effect on intradepartmental candor that motivates the Department of Justice's refusal to release investigative material of its Office of Professional Responsibility should motivate it to exercise great restraint with respect to the dissemination of material such as the preface to the Nathan memorandum.

The Select Committee emphasizes that the controversy surrounding the Nathan memorandum is irrelevant in its entirety to the initiation, continuation, approval, management, supervision, modification, control, and termination of the Abscam undercover investigation, which had ended some 11 months before the Nathan memorandum was disseminated. That controversy could have arisen out of the prosecutorial stage of any criminal matter, irrespective of whether the undercover technique had been used in the investigative stage, and is in that respect only tangentially relevant to the Select Committee's study of undercover operations.

The Select Committee also notes that the Office of Professional Responsibility of the Department of Justice conducted a thorough investigation of the circumstances surrounding the dissemination of the Plaza-Weir and Nathan memoranda. After having completed its own independent investigation of the matter, the Select Committee obtained from Michael Shaheen, the ranking official in that office, a full briefing on the factual findings and conclusions reached by his office. (*See* page 9 *supra.*)

CHAPTER SEVEN—OTHER UNDERCOVER OPERATIONS OF THE DEPARTMENT OF JUSTICE

The Select Committee's understanding of the use of undercover operations by the Department of Justice has benefited not only from its in-depth examination of Abscam, but also from its review of other undercover operations of the FBI, the Drug Enforcement Administration ("DEA"), and the Immigration and Naturalization Service ("INS"). The documents and testimony on these other operations helped place Abscam in better perspective and contributed substantially to the Select Committee's formulation of its recommendations.

Four additional FBI operations were reviewed: (1) Frontload, in which an FBI informant's misconduct resulted in financial losses to a cooperating business firm, which was compensated by the government; (2) Labou, in which the FBI was confronted with serious administrative difficulties with the management of a large-scale proprietary; (3) Buyin, involving political corruption in state government; and (4) Lobster, which demonstrated that FBI policies could achieve law enforcement goals without sacrificing accountability and control. The Select Committee reviewed files which the FBI had made available on each of these operations and took the testimony of FBI officials involved in supervising each operation.

Files on sample DEA and INS operations were also examined, and officials of those agencies discussed at Select Committee hearings their policies for undercover operations.

I. FRONTLOAD

Operation Frontload was identified to the Select Committee by the FBI as an operation that experienced serious problems caused by an informant's misconduct. This operation had already been cited in testimony of a senior Justice Department official before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary in 1981. Associate Deputy Attorney General Paul R. Michel stated that Operation Frontload was an example of the problems that occurred "in the first period, where there were neither the informal procedures nor the committee, and, obviously, not the guidelines." He added that the problems with Frontload "happened because the review committee wasn't in place." [1] Frontload was roughly contemporaneous with the early stages of Abscam and illustrates several of the difficulties that were also present in Abscam's initial phases.

The key figure in Frontload was an FBI informant named Norman Howard, whose role at the outset was similar to the role played by Melvin Weinberg in Abscam. Based on allegations by Howard that New York and New Jersey organized crime figures were engaging in fraud in the construction business, the FBI field offices in those areas had been asked by FBI HQ to evaluate Howard's report. Both the New York and Newark offices had reviewed their files and had made inquiries, which largely substantiated the information provided by Howard. (Sel. Comm. Hrg., Sept. 21, 1982, at 7 (testimony of Oliver B. Revell); *id.* at 23–24 (testimony of James W. Nelson).) The allegations centered on organized crime involvement in construction projects financed by the Department of Housing and Urban Development ("HUD") in New York and New Jersey. The principal technique used by the FBI to confirm these allegations was to monitor conversations between Howard, who consented to the monitoring, and some of the suspected organized crime figures involved. These conversations included references to organized crime control of HUD projects and payoffs to unions. (*Id.* at 7 (testimony of Oliver B. Revell).)

---

[1] FBI Undercover Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 86 (1981) (testimony of Paul R. Michel).

The FBI considered Howard to be reliable because he had provided reliable information in the past in major cases. In view of his later misconduct, the Select Committee asked the FBI for additional information about Howard's prior record. He was first used as an informant by the FBI field office in Chicago from May 1963 until January 1970. The FBI describes Howard during this period as "a marginally successful source" and states that his services were terminated because of "failure to furnish sufficient information." (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 8, 1982).) In 1975, Howard was convicted in the Northern District of Indiana on charges of bank fraud and embezzlement, obstruction of justice, bond default, and interstate transportation of stolen property. At that time, the FBI and the Justice Department proposed that Howard be made available to the FBI for use as an informant in connection with current investigations. This request was approved by an Assistant United States Attorney for the Northern District of Indiana and by the head of the Justice Department's Organized Crime Strike Force in Chicago. Although Howard had received sentences totalling ten years under the terms of his plea agreement, the United States District Court for the Northern District of Indiana approved Howard's use as an FBI informant. In this new phase Howard was first used by the Indianapolis FBI office, which terminated his informant role after eight months due to his pending testimony in cases in that district. Howard was then used by the Chicago FBI office as an informant in the organized crime area, and he was acting in that capacity just before the initiation of Frontload. (*Id.*)

There is no indication from the information provided by the FBI that, during this second phase of his work as an FBI informant, Howard had provided erroneous information or otherwise violated his obligations. His conviction on serious criminal charges in 1975 demonstrated his knowledge of the means employed for certain types of white-collar crime. However, as subsequent events would show, Howard also gained sufficient confidence in his skills that he came to believe, by 1978 if not earlier, that he could commit such crimes unbeknownst to the FBI while acting as an FBI informant.

In January 1978 the Chicago FBI office stated that Howard specialized in the writing of surety bonds, specifically performance and contract bonds for construction projects. Immediately prior to the initiation of Frontload, the government moved to reduce Howard's sentence to the time he had served for his 1975 conviction. This motion was granted by the trial judge, and Howard was placed on five years probation. The trial judge was aware that Howard was continuing to provide information to the FBI following his resentencing to probation. The United States Attorney's Offices for the Northern District of Indiana and the Northern District of Illinois, as well as the Chicago Strike Force, also knew of Howard's relationship with the FBI at the inception of Frontload. (*Id.*) Nevertheless, principal responsibility for the misplaced confidence in Howard must rest with the FBI, which formulated the Frontload scenario that gave Howard access to the means of committing further crimes.

Howard's information about organized crime involvement in HUD-financed construction projects in New York and New Jersey provided the basis for an FBI investigation. The decision to employ the undercover technique in this investigation was made in February and March of 1978. The plan was to place two undercover FBI agents in business as an insurance bonding agency capable of writing bid, payment, and performance bonds for construction projects. Under the bonding agency cover, the agents would have the opportunity to monitor ongoing illegal activity and to obtain evidence of fraud and labor racketeering violations. The aims were ambitious and wide-ranging. Frontload offered the prospect of giving the FBI inside information on "the degree and scope of organized crime control of the construction projects and related public corruption." (Sel. Comm. Hrg., Sept. 21, 1982, at 7 (testimony of Oliver B. Revell).) The FBI also anticipated that there could be "a degree of participation in these illegal activities with the targets of the investigation under standards which would avoid entrapment." (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 8, 1982).)

The role of informant Howard in the operation was not actually to write bonds, but only to "have the apparent authority in order to provide the undercover agents and Howard an entree into the organized crime elements in the construction industry." (*Id.*) To set up their bonding agency front, the FBI agents sought the assistance of Maurice Greenberg, President of the American International Group ("AIG"), who agreed to help establish the agents and Howard in the bonding business. Greenberg suggested using the New Hampshire Insurance Company ("NHIC"), a member of the American International Group, for this purpose because it was the only one of the AIG's subsidiaries that had written performance bonds, although it had not done so in recent years. Discussions then began between the President of NHIC and the FBI agents and Howard, who already had his own company in Illinois, Northfield Associates. It was agreed that Northfield Associates would be appointed bonding agent for NHIC, and the undercover agents would play the role of NHIC's marketing representatives. The insurance company and its President, Carl Barton, would not profit from the arrangement—their motive was responsible citizenship. (Sel. Comm. Hrg., Sept. 21, 1982, at 8 (testimony of Oliver B. Revell).)

As approved by the FBI Associate Director in late March 1978 Frontload offered a complicated scenario covering diverse geographic locations. Four FBI field offices had been involved—the New York and New Jersey offices where the targets of the operation were located and the Indiana and Illinois offices that had previously handled the informant. Howard's bonding company was based in Chicago and would serve as a front for the operation in New York and New Jersey.

In these circumstances, informant Howard persuaded an official of NHIC to provide him a corporate seal and all the necessary forms, documents, and power of attorney to write bonds unilaterally. NHIC acted in good faith, but without the FBI's knowlege. By the end of May 1978, Howard had written his own performance bonds totalling several million dollars. Howard's fraud was discovered on May 30, 1978. NHIC disclaimed the bonds he had written, and civil suits were filed against the insurance company by persons whom Howard had defrauded. (*Id.* at 8-9 (testimony of Oliver B. Revell).) Howard appears to have believed that, given the dispersed locations involved, he could operate independently without being detected by either the FBI agents in New York responsible for his supervision or by NHIC, which was not otherwise engaged in the bonding business.

The Frontload investigation did not end when Howard ceased to be an informant. A major subject of the investigation was convicted of conspiracy charges and agreed to testify against others. Aided by his testimony, the government secured the conviction of twelve public officials and organized crime figures. The officials included the Mayor, the Deputy Chief of Police, and the School Board President of Union City, New Jersey. (*Id.* at 9 (testimony of Oliver B. Revell).) In August 1978 Norman Howard was charged with four counts of interstate transportation of stolen property and fraud against the government for insurance fraud unrelated to Frontload. According to the FBI, he was not prosecuted on fraud charges relating to Frontload "because of the pending nature of the criminal investigation at that time." (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 8, 1982).)

Perhaps as important as the criminal convictions associated with Frontload was the question of liability of the New Hampshire Insurance Company, whose President had agreed to assist the FBI as a matter of civic duty. NHIC contended that the subject of indemnification was discussed as early as March 1, 1978, when Howard and the two FBI agents were introduced to the President of the company, Carl Barton. According to Barton, he brought up the subject of indemnification at that time in the event that any of the bonds written by Howard went "sour." The first written record concerning indemnification was a letter of April 13, 1978, sent to an FBI agent in Chicago enclosing an indemnification agreement. This was followed by a draft FBI letter to Barton. The FBI's position is that no "formal agreements" regarding indemnification were reached as a result of these negotiations before discovery of Howard's fraud on May 30, 1978. (*Id.*)

As noted in the discussion of the Select Committee's legislative recommendations, the FBI does not have clear statutory authority to enter into indemnification agreements with cooperating parties, like the New Hampshire Insurance Company, who may confront financial risks if they decide to assist an FBI undercover operation. Express statutory indemnification authority is required so that government agencies do not have unlimited power to enter into agreements making the government liable for damages in an unlimited amount. This situation should be distinguished from a decision by the government to save a cooperating party from financial losses after they have occurred and can be measured.

In Frontload the Attorney General made such a decision. Following a meeting on March 21, 1979, between FBI Director Webster and Attorney General Griffin B. Bell, it was decided that the United States would protect NHIC from financial losses arising out of Frontload. The formal decision was embodied in a letter of April 11, 1979, from Associate Attorney General Michael H. Egan offering to allow the United States to be impleaded as a third party in the civil actions related to Frontload in order that the United States could defend the New Hampshire Insurance Company and pay any judgments against it. (*Id.*) At one point the government's potential liability amounted to millions of dollars. With most of the suits settled or dismissed, the actual cost to the government has totalled about $825,000. (Sel. Comm. Hrg., Sept. 21, 1982, at 9 (testimony of Oliver B. Revell).)

In retrospect, FBI officials admitted that they knew of the potential for Howard to turn sour as an informant. But by every measure under FBI guidelines, he was suitable. Even though he was a convicted criminal, Howard had provided reliable information in previous cases. Before his role in Frontload took shape, Howard's allegations about organized crime involvement in the construction industry in New York and New Jersey were corroborated by the FBI offices in those districts. An office that had used Howard over a period of years was asked to evaluate his performance and said he had been productive. All the FBI offices recommended his continued use as an informant, and the New York and Newark offices "heartily endorsed" Frontload as both "necessary" and "viable." (*Id.* at 24.)

The main flaw in Frontload was the complexity and geographical dispersion of the operation, which allowed the informant to use the scenario for his own criminal activities. The lessons of Frontload are, therefore, comparable to those of Abscam insofar as both operations demonstrate the need for stricter supervision of informants who are convicted criminals.

Frontload also stands as a warning of the risks that cooperating parties must run if they agree to assist the FBI undercover operations in the absence of a reasonable assurance of indemnification for losses resulting from that cooperation. On the one hand, Frontload demonstrates that the Department of Justice will in compelling cases assume the financial responsibility and represent a cooperating party in court. On the other hand, Frontload shows the need for legislation to give the FBI express statutory authority to enter into indemnification agreements in advance, with reasonable safeguards against over-commitment. The United States government cannot continue to ask law-abiding citizens like Maurice Greenberg and Carl Barton to put the financial safety of their business firms on the line for the sake of stronger law enforcement without more adequate assurances that the government will protect their interests.

II. LABOU

The FBI undercover operation code-named Labou clearly exemplifies the growing pains involved in expanding such operations during the late 1970s. It was the FBI's first attempt to manage a legitimate business enterprise of substantial magnitude.

With the help of an independent businessman, the FBI formed its own construction company as a means of investigating possible construction fraud in the Washington, D.C., area. Because of the FBI's inexperience with the management of construction companies, mistakes were made in controlling overhead and too much money was spent. Some of the personnel involved had to be replaced and more stringent management controls were imposed. FBI Assistant Director Oliver B. Revell testified before the Select Committee that in Labou the FBI "bit off more than we could chew at that time" and that the operation "taught us institutionally how to deal with these major, significant problems." (Sel. Comm. Hrg., Sept. 21, 1982, at 9-11, 30 (testimony of Oliver B. Revell).) The record of Labou is equally important for Congress to understand as it seeks to assess FBI undercover operations and as it continues to appropriate funds for them.

The origins of Labou tell a great deal about the FBI as an organization during the period when Abscam and other controversial undercover operations, such as Frontload, were initiated. Political scientist James Q. Wilson has recounted how, during 1977-78, "pressure inside the Bureau to develop major white-collar crime cases mounted." He attributes this pressure partly to Director Clarence M. Kelley's allocation of more resources to one FBI field office that had been a laboratory for an experiment in focusing investigative efforts on "quality" racketeering and corruption cases. Wilson also cites congressional criticism of the FBI at that time for its alleged reluctance to get involved in more complex white-collar crime cases.[2] In this atmosphere Judge William H. Webster succeeded Clarence Kelley as FBI Director and, within a few months after taking office, approved the most complex and expensive undercover operation in the FBI's history—Labou.

Members of the Select Committee questioned FBI representatives about the basis for undertaking Labou. Assistant Director Revell's prepared statement regarding Labou described it as "predicated on reports from several FBI informants, and a review of the files of our Washington Field Office." (Sel. Comm. Hrg., Sept. 21, 1982), at 10 (testimony of Oliver B. Revell).) When questioned, however, Revell turned to former FBI official Bob A. Ricks, General Counsel at DEA, who had been an agent in the FBI Legal Counsel Division with responsibility for legal and procedural matters involving Labou at its inception. Ricks later became a field supervisor in the

---

[2] Wilson, *supra* page 2 note 5, at 1-3, 8-9, 13 (1980).

Washington Field Office with direct supervisory responsibilities over Labou and other investigations. (*Id.* at 3–4 (testimony of Oliver B. Revell).) Ricks testified that Labou was not started as the result of an informant. Ricks explained,

> What happened was the Washington Field Office on their own initiative set about to find out what the prevailing crime problem was in the area. They contacted, as we said, sources. Now, those sources were, in most cases, legitimate business-people, people we have had contact with in the past. They also contacted the United States Attorney's Office to see what the prevailing criminal problem—what major white-collar crime problem did we have. This was a new priority in the FBI, so they were seeking to address that problem, trying to determine what the major white-collar crime problem was, and the source in this case, Muffoletto, was only brought into the operation after we went out and sought his assistance. He did not initiate this operation. (*Id.* at 25 (testimony of Bob A. Ricks).)

A member of the Select Committee asked if the FBI just said, "Well, here is Washington. There is bound to be some criminal activity going on here. Let us search around and see if we can find out what it is." Ricks replied,

> Well, what they attempted to do was exactly what any resourceful FBI Agent should do, and that is to find out what your criminal problem is. It was not, "Let us open up a fishing expedition and throw out a net and see what we might catch." It was going through the files, trying to address problems, complaints, talking to informed people to determine what really was the major white-collar crime problem in the area. The white-collar crime in many cases was new to the FBI. We had addressed it on the surface, but never had we attempted to penetrate many of the areas of white-collar crime previously. (*Id.* at 26–27 (testimony of Bob A. Ricks).)

Assistant Director Revell added, after stressing the difficulty of getting "inside information" about consensual crimes, that the scenario was based on "general intelligence that this is an ongoing practice." He went on to state,

> We have had other cases where, in essence, our antennae picked up some vibrations, and we set about to follow those vibrations, and in doing so, we established a scenario to test that intelligence, and once we found it was accurate, we proceeded. (*Id.* at 27 (testimony of Oliver B. Revell).)

It was on this basis that the FBI proceeded to put the Labou scenario into effect.

After Director Webster approved Labou in August 1978 funds were budgeted for an elaborate facade, including construction offices, and for renovating two houses. At the FBI's request, Richard Muffoletto, an independent businessman who had assisted the FBI with cases in New York involving kickbacks to prominent officials for construction contracts, agreed to help with Labou. The initial plan was for Muffoletto to be the sole owner of the company; but his inability to obtain bonding on a short-term basis made it necessary for the FBI to become coindemnitor of all projects awarded. This resulted in the FBI's assuming ownership of the construction company. (*Id.* at 10 (testimony of Oliver B. Revell).) The initial budget request that was proposed was for $305,320; but by the time the formal request for approval was made several months later, that had increased to $899,914. Former Agent Ricks testified that the original submission was "perhaps not totally realistic" and was "probably over-optimistic." The agents proposing the operation "decided that they needed a number of more undercover agents, they needed additional support for those agents, including the residences involved, cars, wardrobes. . . ." They expected that the construction company "would be self-sustaining within about a six month period—which was totally unrealistic." (*Id.* at 55 (testimony of Bob A. Ricks).) In the end, the total net cost to the FBI for Labou came out to be $1.3 million. (*Id.* at 65 (testimony of Bob A. Ricks).) Assistant Director Revell added that, although Muffoletto was an expert in the construction business, the FBI "simply . . . did not anticipate all that might be involved." (*Id.* at 65 (testimony of Oliver B. Revell).)

As described by former Agent Ricks, Labou was an administrative nightmare from the beginning and was almost as complicated to stop as it was to start. He testified,

> What we learned was that we were spending 99 percent of our time initially, trying to get a company going. All of our energies were absorbed by just maintaining the thing, keeping it afloat. There was little time left to go out and actually investigate. . . . We found our people, in some cases, were only getting two, three, four hours' sleep a night; they had no time left. The cooperative source, he could go on three hours' sleep a night. He would work 14, 15 hours a day at the job, and they would try to meet with subjects until two or three o'clock in the morning, and had to go back to work at seven. You cannot go on that schedule very long without burning out. (*Id.* at 57–58 (testimony of Bob A. Ricks).)

The inability to use Labou facilities fully for investigative purposes led to the one linkage between Abscam and Labou. Assistant Director Revell denied charges that a Georgetown townhouse obtained for Labou was used for Abscam to hide financial losses incurred in Labou. He explained that the facility "was not being totally utilized" and "comported with the scenario" in Abscam. As a supervisor involved with both operations, Agent Ricks had "suggested to the two entities that they might want to utilize this particular resource." According to Assistant Director Revell, "There was never a mixing of the subjects of the cases, there was never a mixing of the cases themselves. The facilities of one case were used to augment and to assist in the operation of the other." (*Id.* at 60–61 (testimony of Oliver B. Revell).)

Former Agent Ricks explained the one qualification to that general statement. Agent Amoroso used the construction company in Labou to enhance his credibility for Abscam. Ricks stated,

> What we did, if they did any checking at all, of the subjects, they would learn it was Olympic Construction that was behind the house where they were meeting. So it was decided that the sheik would have the story that he had bought the construction company; he was looking for contracts in the Washington, D.C. area. . . . At one point in the operation, we were thinking—we had some leads in the New York-New Jersey area regarding construction, and in fact, Amoroso did throw out the proposition that they had a construction company that was willing to do some work in the area. We ran out of time, and that was never followed up on, but occasionally, it did come up. (*Id.* at 61-62 (testimony of Bob A. Ricks).)

The Select Committee found nothing to indicate that availability of the unused Georgetown townhouse acquired for Labou substantially affected the course of the Abscam operation. If that facility had not been available, another location would probably have been found. Moreover, use of the Labou townhouse for Abscam made more efficient use of FBI resources than would have been the case if the two operations had been entirely separate.[3]

As for the investigative side of Labou, the undercover FBI agents and Muffoletto sought to create opportunities for illegal conduct by suspected con men, financiers, and persons associated with all aspects of the construction trade. The scenario was based on the premise that, in order to penetrate ongoing corruption in the construction industry, it was necessary to compete with corrupt companies on an equal footing and to be invited into ongoing conspiracies. The undercover company was portrayed in construction industry circles as being corrupt, with a financial statement of suspicious origin, which gave corrupt individuals the opportunity to enter into an illegal relationship with the company. (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 8, 1982).)

The one criminal case resulting from Labou led to the convictions of a major contractor, the bonding manager of Allstate Insurance Company, and a Certified Public Accountant ("CPA") whose "bust out" scheme could have cost as much as $50 million. A similar operation by the same contractor had caused another insurance company to lose an estimated $10 million. The "bust out" scheme required the CPA to furnish fraudulent financial statements so the contractor could obtain a greater bonding line. The bonding manager, as a result of bribes paid to him by the contractor, would issue performance and payment bonds. The contractor intended to build up his work on hand substantially and siphon off money from his business by transferring the funds to a consulting company in the Bahamas, which would make a transfer of funds to accounts in

---

[3] The FBI states that activity at the townhouse "oftentimes became quite hectic with meetings alternating between subjects of the Abscam investigation and the Labou operation." (Sel. Comm. Hrg., Sept. 21, 1982, at 11 (testimony of Oliver B. Revell).)

Lichtenstein. (Sel. Comm. Hrg., Sept. 21, 1982, at 11-12 (testimony of Oliver B. Revell).)

Extensive and complex negotiations were required for the FBI to dispose of its ownership of Olympic Construction Company on June 30, 1980. The FBI had always intended that it would end up as Muffoletto's company. At the start Muffoletto had said he wanted to organize a company in Washington, D.C., and the FBI had no desire to continue to run a construction company. In determining the purchase price to be paid by Muffoletto for the company, the FBI found it difficult to calculate exactly what the FBI had put into the company for cover purposes to build a facade and what the FBI had contributed as working capital. The FBI could ask Muffoletto to pay for only the working capital that exceeded the expenses the FBI incurred for investigative purposes. The company had never made a profit because of the enormous overhead expenses. (*Id.* at 63-64 (testimony of Bob A. Ricks).)

At the Select Committee's request, the FBI submitted detailed information on the financial arrangements with Muffoletto. The initial agreement called for him to be paid a salary (from Olympic Construction's gross receipts) at an annual rate of $72,000. Additionally, he was furnished an automobile and paid transportation expenses associated with his commuting between Washington, D.C., and New York. After June 1979 his salary was paid by Olympic Construction Corporation rather than by the FBI.

The sale of the firm to Muffoletto at the end of the operation was not considered to be part of his compensation. He paid the FBI $70,000 in cash and forgave the FBI's share on the cost of a computer valued at $22,773. At the time of the sale, the principal value of the company was in contracts being performed, many of which had little in the way of profit remaining. The FBI considered the principal asset, therefore, to be the company's "good will," all of which had been established through the efforts of Muffoletto. Over the course of the operation, the firm had used all the profits from its construction projects to finance the undercover operation and to pay for the company's overhead. All the funds generated had been reinvested into the company, and no surplus remained at the time of the sale. The $70,000 paid by Muffoletto was returned to the Treasury of the United States as miscellaneous receipts. (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 8, 1982).)

As for the FBI's conduct in Labou, the emphasis by FBI officials on financial and management problems tends to obscure one of the most significant features of the operation—the absence of reasonable suspicion that a particular crime was being committed by identifiable persons. All the FBI had was "general intelligence" or, as Assistant Director Revell put it, "vibrations" picked up by "our antennae." The Select Committee recognizes that the undercover technique may be employed in the absence of particular suspects, so long as there is a reasonable suspicion that a pattern of criminal activity is underway in a particular area. But "vibrations" or "general intelligence" do not constitute reasonable suspicion.

A good example of an operation that met the reasonable suspicion standard, but did not focus initially on particular suspects, was discussed by Assistant Director Revell. Operation Corcom was set up in Oklahoma to determine the truth of information the FBI had received about widespread corruption practices among vendors and county commissioners. (Sel. Comm. Hrg., Sept. 21, 1982, at 28 (testimony of Oliver B. Revell).)

Director Webster testified before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary that in many investigations of consensual white-collar crimes, the FBI does not have "clear evidence that someone is engaging in" a specific criminal activity. He stated, "What you have is a smell. You have people who talk about it and talk around it and the tendency in our investigations is to focus upon this kind of activity, rather than upon particular individuals and create a setting in which these allegations, or smells if you want to call it, either are true or not true." Director Webster said this was "largely true" in the Oklahoma situation where the FBI had "no clear evidence as such, but a clear kind of smell." The FBI established a business to learn more about the alleged corrupt practices and to participate in those practices. To start with, however, the FBI "did not have . . . particular candidates." (House Jud. Subcomm. Hrg., Apr. 29, 1982, at 46–47 (testimony of William H. Webster).)

Labou differed from Corcom in Oklahoma because the FBI did not have the same kind of articulable basis for its suspicion that a particular type of criminal activity was underway. The "general intelligence" available to the FBI at the outset of Labou did not meet the standard that was satisfied by the specific allegations in Corcom. FBI policies and current FBI guidelines require that, when there is no reasonable suspicion of likely criminal conduct by an individual, there must be reasonable suspicion of a pattern of criminal activity in the area. (Sel. Comm. Hrg., Sept. 21, 1982, at 29 (testimony of Oliver B. Revell).) FBI officials testified that they would not initiate an operation like Labou today on the basis of the type of information that triggered that operation in 1978. (*Id.* at 57 (testimony of Bob A. Ricks); *id.* at 59 (testimony of Oliver B. Revell).)

Nonetheless, Labou and Corcom demonstrate that the FBI requires the authority to initiate undercover operations without having a particular suspect in mind, so long as there are safeguards to prevent "fishing expeditions." This requirement is reflected in the Select Committee's recommendations. FBI officials do not need the power to conduct undercover operations without reasonable suspicion, despite their references to "vibrations" or "smells." Their testimony acknowledges the need to articulate a reasonable factual basis for suspecting that a pattern of criminal activity is underway. In Labou the information was too diffuse and ambiguous to provide a reasonable basis for the operation that was developed and approved. This does not mean the FBI must have information pinpointing an individual suspect. Rather, it shows the desirability of following the model of Corcom where a credible individual provided more specific information about a particular type of suspected crime.

Finally, Labou demonstrated vividly to FBI policymakers the need for more stringent management controls over proprietary business firms used as cover for investigative operations. Former Agent Ricks testified,

> If we are going to establish something this large, we had numerous discussions that it should only be where the targets are of such magnitude, are well-known, and we really are ready, willing, and able to address these with all the personnel needed, and the resources. But it must be on a truly selective case. This would not be something that anyone would approve routinely now. We have had a couple of instances where they have come in, and we demand an enormous amount of information before such a thing would be given consideration. Usually, they are knocked out of the box, and as a result of the Labou operation, and rightly so, because we want to know what commitment they have. (*Id.* at 57 (testimony of Bob A. Ricks).)

The experience with Labou does not negate the value of using proprietary business cover, but it does underscore the need for caution. As Assistant Director Revell testified, "That does not mean that we cannot use a proprietary in a much simpler context, in a much more restrained context, and that it is not effective. In fact, it has been very effective for us in many cases." (*Id.* at 59 (testimony of Oliver B. Revell).) With the management practices now in place, the FBI should have the statutory authority to establish proprietary business firms within the framework recommended by the Select Committee.

III. BUYIN

Operation Buyin occurred in the State of Washington at about the same time as Frontload, Labou, and Abscam. Because its scale was much smaller and its objectives more limited, Buyin did not produce the kinds of problems that these other operations exhibited. In many respects, it typifies the successful use of undercover techniques against white-collar crime and political corruption.

The FBI undercover agents in Buyin did not rely on an informant to play a key role in the operation. Instead, the undercover agents dealt directly with a corrupt, unwitting middleman who put the agents in contact with state legislators willing to sell their office. Buyin resulted in the conviction of the middleman (a lobbyist) and the Speaker of the House and Majority Leader of the Senate in the Washington state legislature. Overall, the undercover phase of Buyin lasted for 16 months and changed its direction from the initial target of municipal corruption to a substantially different focus on state legislators.

While Buyin was generally successful and comparatively well-managed, the Select Committee found that it illustrates several major policy issues with regard to undercover operations. Specifically, the operation highlights the ambiguities in the FBI guidelines for undercover operations that involve public officials and for operations that substantially change direction. Although the guidelines were not in effect at the time of Buyin, these issues would have arisen even if the operation had been governed by the current guidelines. Buyin also sheds more light on the question of the amount of information needed to establish reasonable suspicion as the threshold for initiating an operation or changing its direction substantially.

In July 1978 the FBI's Seattle Field Office asked FBI HQ for permission to begin the undercover operation that came to be called Buyin. The request was based on information provided to the FBI by state and local authorities. An undercover Washington state police officer had reported an allegation that a city official was accepting bribes to permit illegal gambling to operate openly and to support the enactment of legislation by the state legislature to legalize gambling. A local police informant had alleged that this same public official had received illegally the proceeds of a $20,000 loan acquired by a cardroom owner. The scenario proposed by the Seattle FBI Field Office was for an undercover FBI agent to invest money in a cardroom in Washington, with the understanding that casino gambling and slot machines eventually would be legalized. It was expected that the city official would offer to assist in running the cardroom in return for kickbacks. (Sel. Comm. Hrg., Sept. 21, 1982, at 4–5, 16–17 (testimony of Oliver B. Revell).)

The FBI HQ Supervisor for Buyin, Special Agent J. Harper Wilson, testified that the Seattle office was allowed to go ahead because FBI HQ permission was not required to operate the very limited undercover activity that it was proposing, aimed at the local official. (*Id.* at 16 (testimony of J. Harper Wilson).) Assistant Director Oliver B. Revell explained that, under current policies and guidelines as well as the policies in effect in 1978, prior notice to FBI HQ is not required. He stated:

> We can have a one-time contact, either by an informant or by an undercover agent, with an official or with a public employee about which we have received information that they were involved in corrupt activities and would be interested in accepting a bribe for illegal purposes, and carry that out at the level of the SAC only with a post-notification requirement to FBI Headquarters. (*Id.* at 17 (testimony of Oliver B. Revell).)

It made no difference that the public official was a city mayor. Nor would it make a difference under current guidelines, as interpreted by the FBI with the tacit acquiescence of the Attorney General.

Testifying about the guidelines generally, Assistant Director Revell was asked about a provision in the Attorney General's guidelines for undercover operations requiring that any proposed investigation of possible corrupt action by a public official be approved by the Undercover Operations Review Committee at FBI HQ. Such operations are considered "sensitive circumstances" under the guidelines. Assistant Director Revell explained that the FBI defined "public official" to exclude many types of officials at state and local government levels. The FBI's definition was submitted to the Attorney General in mid-1981 and was adopted by the FBI "subject to any correction or redirection by the Attorney General." (Sel. Comm. Hrg., July 20, 1982, at 51–52 (testimony of Oliver B Revell).) The FBI's rationale for this modification or clarification of the guidelines was that an "operational definition" was needed. Revell stated:

> Certainly, public official does not mean all three million public employees in the United States. Therefore, it was essential that we have an operational definition which was, of course, approved by various departmental officials before it was sent to the department, including those members of the review committee, including the chief of the Public Integrity Section. (*Id.* at 53.)

Admitting that the definition was "not meant to be set in concrete," Revell suggested that more categories such as state legislators "should be incorporated as a public official" requiring approval by the Undercover Operations Review Committee. Nevertheless, he insisted that without an operational definition the guidelines would be "unworkable." (*Id.* at 53-54.)

Shortly after the undercover agent in Buyin began playing the role of representative of a California gambling enterprise, he met a lobbyist who said he was in a position to introduce the undercover agent to the Speaker of the House and the Majority Leader of the Senate in the state legislature. The lobbyist, who thought he was talking with a representative of gambling interests, said the two legislators would be willing to introduce and support the desired gambling legislation if they could benefit personally. (Sel. Comm. Hrg., Sept. 21, 1982, at 5 (testimony of Oliver B. Revell).) The lobbyist also indicated that the original suspect—the mayor—was not in a position to do what the allegations indicated he said he could do. (*Id.* at 16 (testimony of J. Harper Wilson).) Based on this information, the Seattle Field Office decided to change the direction of Buyin from the local official to the state legislators. As with the initiation of the operation, Review Committee approval was not required for this shift, nor would it be required under current guidelines.

The undercover operations guidelines do not require the approval of the Review Committee for changes in the investigative direction of an operation unless new "sensitive circumstances" are involved. Because the state legislators who became suspects in Buyin were not "public officials" as defined by the FBI, even if the guidelines had been in effect, the decision to focus on them could have been made without Review Committee approval. However, if the magnitude or targets of the operation had been such as to require initial Review Committee approval under the guidelines, Assistant Director Revell testified that a "significant change in direction" would have required Review Committee approval. The guidelines themselves require such approval only if new "sensitive circumstances" arise; but Revell said that the FBI's internal investigative policies and practices require FBI HQ approval of any other significant change in investigative direction. (Sel. Comm. Hrg., July 20, 1982, at 68–72 (testimony of Oliver B. Revell).)

As it developed, in Buyin, the Seattle Field Office had to notify FBI HQ of new developments in the operation at almost the same time as the change in direction—but not because the focus changed from municipal corruption to leaders of the state legislature. Instead, FBI internal procedures required field offices to obtain FBI HQ approval for the expenditure or more than $1,000 for an operation; and the Seattle office proposed that $8,500 be authorized for use as a "consultation fee" to pay the lobbyist who was offering to act as a middleman. The FBI undercover agent wanted to give the lobbyist the money to "spread around" to unnamed individuals basically at his discretion. Approval by the Undercover Operations Review Committee was also required because the Seattle office proposed to deposit the money in a bank account, which could be done only if the Attorney General certified that a waiver of federal statutes barring deposit of public funds in banks was necessary for the operation. (Sel. Comm. Hrg., Sept. 21, 1982, at 33-35 (testimony of J. Harper Wilson).)

Agent Wilson, the FBI HQ supervisor who handled Buyin, testified that this request from the Seattle office in September 1978 was not approved by the Review Committee until January 1979. The reason for the delay was that FBI HQ officials who looked at the request found that "it did not have the merit that it needed" to justify the changes proposed in the operation. Agent Wilson described these changes as "an escalation" involving both "high level" officials and a "longer term operation." Before sending the proposal to the Review Committee, FBI HQ officials asked the Seattle Field Office to make efforts to corroborate the allegations made by the lobbyist-middleman that the leaders of the state legislature would take a bribe. Consequently, meetings were arranged between the undercover FBI agents and the two state legislators. The turning point came in December 1978 when the Speaker of the House of the state legislature told the undercover agents that he would be willing to discuss his influence for a price. He made the statement, "You don't buy people anymore; you just rent them." (*Id.* at 19 (testimony of J. Harper Wilson).)

Although FBI HQ authorized the Seattle Field Office to pay the "spread around" money to the middleman, it was not until much later that the undercover agents were authorized to offer bribes directly to the state legislators. The FBI did not rely on the word of the corrupt middleman in making this decision, even though he was a close personal friend of one of the legislators. Neither the middleman nor the legislators had any past record of criminality, and the middleman had a reputation in the state as being an effective lobbyist for various causes. The FBI had no "track record" against which to evaluate the lobbyist's statements to the undercover agents that the legislators were corrupt. (*Id.* at 19-21 (testimony of J. Harper Wilson and Oliver B. Revell).) The FBI's decision to insist on corroboration of the allegations by an untested middleman before authorizing the offer of a bribe in Buyin stands in contrast to the contemporaneous practice in Abscam. (*See* pages 68-77 *supra.*)

The divergent approaches followed in Buyin and Abscam indicate that, in the 1978-79 period, there was no consensus within the FBI as to what was sufficient to establish the reasonable suspicion needed for the use of intrusive undercover techniques. Buyin demonstrated that, with careful supervision from headquarters, the FBI could proceed step-by-step from less intrusive to more intrusive undercover methods as the initial allegations received more solid corroboration. The first information from the middleman naming the two leaders of the legislature as corrupt did not lead at once to the offer of a bribe. Instead, the middleman's corrupt intentions were tested by the offer of "spread around" money; and the legislators were contacted directly by the undercover agents to get the necessary assurances that they would sell their office. Only after passing through each of these stages did the Undercover Operations Review Committee approve payment of money to the two legislators. The standard of "reasonable suspicion" was applied at each stage: It was reasonable to employ less sensitive methods on the basis of the initial information, and additional facts were articulated as the basis for using more intrusive techniques that posed greater risks to the privacy and reputation of suspects who might (as happened in some instances in Abscam) have had no criminal intent. Indeed, the statement of the Speaker of the House of the state legislature could be viewed as establishing a more stringent probable cause showing.

In sum, Buyin demonstrates that the FBI can conduct a successful undercover operation against political corruption entirely within the framework recommended by the Select Committee. Although the standards and procedures followed in Buyin were not in many respects required by the formal regulations then in effect, FBI officials using good judgment and common sense made reasonable decisions. Sometimes those decisions were triggered by artificial considerations, such as the narrow technical legal question of opening a bank account. It would be far better for the standards and guidelines to embody reasonable requirements, based on experience, rather than to depend on the vagaries of administrative performance.

The only difference that would have occurred if Buyin followed the Select Committee's recommendations involves the role of FBI HQ in the initial decision to begin the operation and in the decision to change its targets. Allegations against city mayors and state legislators deserve careful headquarters scrutiny before they become the basis for directing undercover operations against such individuals. Buyin would have been just as successful if that principle had been followed.

IV. LOBSTER

The Select Committee and the FBI agree that Operation Lobster was, as FBI Assistant Director Oliver B. Revell testified, "a textbook example of how successful the undercover technique can be." (Sel. Comm. Hrg., Sept. 21, 1982, at 12 (testimony of Oliver B. Revell).) It was undertaken in 1977, at an early stage in the development of FBI undercover programs and before such controversial operations as Abscam, Frontload, and Labou. The FBI and the Massachusetts state police worked together to plan and implement Lobster, which was funded with about $500,000 by the Law Enforcement Assistance Administration ("LEAA"). Such joint federal-state operations supported by LEAA in the mid-1970s provided the FBI its first extensive experience with undercover operations. (*See* pages 40–43 *supra.*) In many respects the FBI's outstanding conduct in Lobster gave the Select Committee a model against which to assess some aspects of Abscam.

The crime problem that Lobster was designed to combat involved extensive freight hijackings in New England, which were directly and immediately harmful to the trucking industry. Organized crime groups and others were able to steal entire tractor trailer loads of valuable cargo. The FBI had information suggesting that employees of the victim companies arranged the crimes and the details for disposing of the stolen property in advance. Initially, the FBI planned to make a warehouse available to the thieves where they could store the stolen property and arrange for its sale and delivery. The role of the FBI agents and state police officers would be limited to staking out the premises and trying to identify the criminals. Evidence would also be collected through court-ordered wiretaps and electronic surveillance of the building. However, the plan was sufficiently flexible to permit using an undercover agent when the opportunity presented itself. (Sel. Comm. Hrg., Sept. 21, 1982, at 12–13 (testimony of Oliver B. Revell).)

When the FBI changed the scenario and placed undercover agents in the warehouse, an informant was used to introduce the undercover agents to many of the early subjects of the operation. After these initial introductions, the need for informants diminished because the initial subjects began introducing new subjects to the undercover agents. Under the scenario, the primary undercover agent posed as a salvage broker dealing in stolen or hijacked truckloads of merchandise. His warehouse was portrayed as a "safe drop," which was attractive to the hijack gangs. After initial informant introductions had been made and initial subjects had observed the warehouse, these individuals spread the word among other criminals. Consequently, the undercover agents could more or less wait to be contacted. (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr. (Nov. 8, 1982).)

In some instances, however, the undercover agent's role was more active. Where certain subjects had been determined to be predisposed, the agent would solicit stolen goods from them or sell them purportedly stolen goods with an eye towards "having the favor returned." (*Id.*) His role was not to solicit particular types of stolen goods, because the type of property had no bearing on making a prosecutable case. Nevertheless, he did clearly indicate he was interested in buying entire loads as opposed to single items. (*Id.*)

The undercover agent's control of the warehouse facilitated consensual monitoring. When the thieves brought their stolen merchandise to the warehouse to sell to the undercover agent, the FBI recorded the entire transaction on video and audio tape. In this respect Lobster was a form of "sting" operation comparable to smaller scale joint FBI-local police fencing operations funded by LEAA in several parts of the country during that period. Unlike an ordinary sting, however, Lobster involved extensive criminal enterprises. It resulted in the recovery of over $3 million in stolen property and the arrest of more than two dozen persons. Eventually, 57 defendants were convicted in federal and state courts, including six La Cosa Nostra associates and six members of the "Winter Hill Gang," which was notorious in the New England area. The impact on the truck hijacking problem was dramatic. From March 1977 to June 1978 there were 67 hijackings and thefts of tractor trailerloads in New England. From March 1979 through April 1980, there were only six. (Sel. Comm. Hrg., Sept. 21, 1982, at 13 (testimony of Oliver B. Revell).)

The success of Lobster against organized crime activities underscores its importance as an example of an operation that could achieve significant results without relaxing supervision and control mechanisms. The documentation of Lobster was exemplary. The file provided to the Select Committee contained all necessary documentation. In this respect, Lobster contrasts sharply with Abscam.

In the early stages of Lobster, the special agent in charge of the Boston FBI Field Office sent a teletype to FBI HQ saying that, since the submission of the initial plans for the operation, additional avenues of approach were being developed. FBI HQ was informed that the Boston Field Office intended to expand the scope of the operation to include other targets from other cities. Contrary to the initial plan, the Boston office also intended to make greater use of a specific undercover technique. The field office sought FBI HQ approval for this expansion to additional targets from additional cities, and for the expanded use of a particular technique. After June 1977, when this teletype was sent, similar teletypes to FBI HQ appeared at intervals throughout the operation. By contrast, at several significant turning points in Abscam, there was no similar documentation of prompt notification of FBI HQ. (*Id.* at 36-38 (counsel's reference to FBI documents).)

In July 1977 very early in Lobster, the Boston Field Office asked the Legal Counsel Division at FBI HQ to provide legal guidance and recent court decisions on entrapment and the sale of stolen goods. In reply, the Legal Counsel Division sent an extensive memorandum on the current law in the area. No such request to and no similar response from the Legal Counsel Division appear in the Abscam documents. (*Id.* at 38-39.)

Throughout Lobster, the Boston Field Office sent FBI HQ a biweekly summary of the operation, discussing extensively such matters as uses of technical equipment, recoveries of stolen property, new people identified as possible targets in the prior two weeks, and developments regarding old targets in the prior two weeks. No such biweekly reports (or even monthly or bimonthly reports) of this nature appear in the Abscam files. (*Id.* at 39.)

As the closing down of Lobster approached, the Boston Field Office asked FBI HQ for guidance as to the possible problems that could be encountered in preparing paperwork for trial, making arrests, handling evidence, issuing press releases, and otherwise dealing with press relations during the close-down phase. In response, FBI HQ sent several agents and a strike force attorney from Boston to another field office that had had experience with the closing down of complex undercover operations. FBI officials believed that such visits had already proved "highly beneficial" in other cases. In Abscam, the documents do not reflect that any such request was made or assistance provided. (*Id.* at 39-40.)

The thoroughness of the documentation in Lobster is exemplified by the number of written reports prepared by FBI agents on their conversations (FD 302s). In one four-month period in Lobster the agents filed 292 such reports; and in another four-month period they filed 464. Over the entire course of the operation, well over 1,000 FD 302s were prepared to document virtually every conversation that was not recorded on audio or video tape. Fewer than 100 FD 302s were prepared over the two-year life span of Abscam. The agents in Lobster also sent memoranda to FBI HQ every month summarizing all consensual monitoring, identifying parties, date, file, and subject matter. As many, if not more, calls were recorded in Lobster as in Abscam. Extensive surveillance memos described the actions of targets after they arrived at the FBI warehouse. Where telephone calls were made but not recorded, extensive memoranda were placed in the file contemporaneously explaining why the calls were not recorded.

Every 60 days FBI HQ asked the Boston Field Office to account for its use of the authority to employ a body recorder. The field office was to report: (1) whether the recordings had aided in directing the course of the investigation; (2) whether the recordings had obtained direct evidence; (3) whether the recordings had furnished leads; and (4) whether the recording devices had furnished protection to the user. Comparable documentation was not prepared—and apparently not requested—in Abscam. (*Id.* at 40–42.)

FBI officials explained that Lobster differed from Abscam because it was a centralized operation controlled by one office, covering one geographical area and one type of criminal activity. Most of the monitoring was from a fixed location, and everyone on the FBI's side of the operation was an undercover special agent or state police officer. "Therefore," Assistant Director Revell testified, "it was a very controllable type of case." By comparison, Abscam involved a great deal of mobility and "a number of interconnecting spheres of influence . . . not all who operated in conjunction with each other." Another difference was that Lobster did not receive the degree of FBI HQ attention that Abscam did in its later stages. Because Lobster was "being supervised in the field," there was documentation to provide "a post-audit type of reporting to the FBI on that case." Lobster was monitored by FBI HQ on "a reactive basis," as compared with the "continuous ongoing dialogue" between the field and FBI HQ in Abscam. (*Id.* at 42–45 (testimony of Oliver B. Revell).)

Questioned about the differences between Lobster and the early phase of Abscam (June–December 1978) before it turned to major political corruption, Assistant Director Revell stated that the FBI "certainly would like to have all cases receive the accolades" given to Lobster, but that the FBI runs a wide variety of operations:

> We run about 200 undercover cases a year Some of them are very complex; some of them are almost a single, one-time incident. You cannot anticipate which ones are going to turn which way at all times. So long as they comport with those requirements of the law and the requirements of our policy at the time, then we are satisfied. That does not mean that some are not better than others. (*Id.* at 47–48.)

Revell also stressed that FBI policies have changed since 1977–78 and that Lobster rather than Abscam is a model for current FBI procedures:

> We do have monthly reporting requirements. We also have, as you know, a review by the Undercover Review Committee at least every six months if the investigation is to continue. Prior to that review by the Committee, it must be reviewed by the Headquarters supervisor and his section

> chief, to determine if it will even be continued, and that is even preceded by the review by the SAC and the U.S. Attorney. After all that is done, it still has to come to me for my approval, and in certain very sensitive cases, it goes to the Director. (*Id.* at 48-49.)

While unwilling to judge Abscam by the procedures and policies developed by the FBI since 1978, Revell emphasized that FBI undercover operations today should be judged by the controls and safeguards now in effect. (*Id.* at 49-50.)

The Select Committee believes that Lobster does, in fact, represent the FBI's current policy requirements far better than does the early stage of Abscam, when controls were clearly inadequate. This does not mean that Lobster is typical of the large undercover operations the FBI conducts today. Although a major sting operation, Lobster was still a relatively simple scenario aimed at comparatively unsophisticated criminal activity. In recent years the FBI has undertaken far more complex operations against some of the most difficult targets to penetrate. For example, in Bancoshares the FBI formed a fictitious corporation with undercover agents posing as brokers willing to launder large amounts of money accumulated by narcotics traffickers. In Pengem the FBI established an undercover brokerage firm operating in the Silicon Valley of California to uncover evidence to prosecute the receipt, sale, or counterfeiting of stolen electronic components and highly reliable microprocessors. In the interrelated Coldwater-Timber-Genus operation involving undercover agents in Milwaukee, Tampa, and New York City, the FBI successfully penetrated illegal La Cosa Nostra business dealings and obtained evidence of murder, loan sharking, extortion, and corruption. (Sel. Comm. Hrg., July 20, 1982, at 27-30 (testimony of Oliver B. Revell).)

The Select Committee believes that operations such as these are, if properly managed and controlled, necessary for effective federal law enforcement. Their value may outweigh the financial harm that may inevitably result to innocent persons when extensive undercover operations are conducted to achieve their objectives within reasonable standards and controls. Lobster illustrates this dimension as well.

At the end of Lobster it became clear to some of the trucking firms that the FBI had recovered their trucks as much as a year earlier and had not returned the vehicles to their owners. The trucking firms were deprived of the profits they would have made by using the trucks for that period, and also had to pay higher insurance rates because of the unsolved thefts. The FBI could not have returned the trucks earlier without the risk of blowing the cover of the entire operation. The overall operation not only recovered some trucks that had to be held by the FBI for a long period, but also benefited the owners and the entire industry in the long run by breaking up the hijacking gangs. The FBI agent who was FBI HQ supervisor for Lobster testified that the FBI "returned as many as we could safely, as fast as we could." (Sel. Comm. Hrg., Sept. 21, 1982, at 52 (testimony of Richard D. Schwein).) In circumstances such as these, some financial loss to particular persons may be an unavoidable cost to the public of the use of undercover operations to achieve more effective law enforcement.

In egregious cases where FBI negligence results in financial harm to innocent third parties, the Select Committee recommends legislation to provide compensation. (*See* pages 389–96 *infra.*) But in a case like Lobster where the FBI may have adhered to reasonable standards of care, legislating such compensation would force FBI officials to tailor operations so as to eliminate as much as possible any risk to the taxpayer that is not justified by specific anticipated public benefits. And those decisions would be subject to after-the-fact judicial scrutiny. The inhibiting effects on vigorous and aggressive operations against serious crimes are too great a price to pay. Lobster and similar well managed and successful FBI undercover operations demonstrate why a delicate balance must be struck between the imposition of reasonable standards and controls and the need for strong and effective tactics to combat criminal targets.

V. DEA AND INS OPERATIONS

Undercover operations by the Drug Enforcement Agency ("DEA") and the Immigration and Naturalization Service ("INS") differ greatly from FBI undercover operations. They are smaller in scale and have a narrower focus on particular kinds of federal crimes. Neither agency has developed the skills or resources needed for more elaborate undercover operations. Their budgets are smaller, and they have not required the special statutory authority that was enacted for the FBI in 1978 and expired on February 1, 1982, with regard to leases, bank deposits, proprietaries and the use of income from operations to offset their expenditures. Nevertheless, the smaller operations by the DEA and the INS can raise some of the same issues presented by FBI operations. One DEA operation in particular, code named Scorpion, was examined in some depth by the Select Committee in considering its recommendations.

Current standards and procedures for DEA undercover Operations are far less elaborate than for FBI operations. DEA Chief Counsel Bob A. Ricks testified that the DEA makes only limited use of proprietaries in complex investigations. In the very few instances in which the DEA actually sets up an undercover business, it is often a storefront or a maildrop. The DEA has never used more elaborate proprietaries like the FBI construction company in Frontload. DEA proprietaries may incorporate and have "all the indicia of being a legitimate business," but they do not really compete with legitimate private firms. (Sel. Comm. Hrg., Sept. 21, 1982, at 58, 65 (testimony of Bob A. Ricks).)

DEA Chief Counsel Ricks also stressed that the DEA is "a single-mission agency" that does not conduct "public integrity investigations" or "seek out public corruption." If the DEA gets into "a long-term situation" involving undercover techniques, it calls in the FBI and is then bound by the FBI guidelines. Ricks argues against making the current FBI guidelines applicable to the DEA "because they are geared to the FBI structure." By this he meant that the DEA is not organized the way the FBI is for the various levels of review—Special Agent in Charge at the field office level, FBI HQ and the Undercover Operations Review Committee with Departmental officials attending, and consultation with the Justice

Department's Office of Legal Counsel and Criminal Division. The DEA does not have exactly the same relationships with these other components of the Department.

Nevertheless, Ricks also testified that the DEA intends to expand its use of undercover operations. At present all complex undercover operations—those that require proprietaries or raise issues of legal liability or significant risk of violence—are reviewed by the Chief Counsel's office. Acting Administrator Franis M. Mullen, Jr., has ordered that the DEA consider establishing an Undercover Review Committee. (*Id.* at 65–66 (testimony of Bob A. Ricks).)

Another difference between the FBI and the DEA is the way each agency uses informants. Ricks testified that the FBI will go to almost any cost to protect its informants, while the DEA as a rule uses what it calls "defendant informants" (or "defendant sources") who are persons whom DEA has "got in a bind in some way" because they are "trying to negotiate a deal." The DEA works much more often with "street-level types" with bad character and criminal records. DEA does not maintain such informants on a long-term basis, because they cannot be trusted. (*Id.* At 67.) Another difference is the relationship with the United States Attorney's Office. The DEA reveals its informants to the United States Attorney and makes its files available to the United States Attorney upon request. The FBI does not. Finally, as a safeguard that the FBI does not have, DEA guidelines require that whenever practicable, two DEA agents must be present at all contacts and interviews with informants. (*Id.* at 68 (testimony of Oliver B. Revell).)

These differences may justify some variations in policy between the FBI and the DEA with regard to undercover operations. However, as the DEA moves towards more extensive operations and closer integration with the FBI, common procedures appear desirable. This is particularly true when it comes to situations where innocent persons may be tested to determine whether they are predisposed to committing crimes. The DEA's Operation Scorpion illustrates the difficult policy issues that must be addressed in DEA as well as FBI operations.

In Scorpion the DEA set up a storefront where it sold chemicals that could be used either for legitimate purposes or for the production of illicit drugs. The DEA advertised the opening of this business in, among other places, a magazine named *High Times,* which is purchased by people who are regular drug users, among others. When an individual entered the premises or placed a telephone call for an order at the storefront, the DEA undercover agent manning the store did not know whether the order was being placed by someone who wanted to use the drugs for legitimate or illegitimate purposes. All transactions in the store or over the store telephone were taped. In order to determine whether the person was connected to an illegal activity, the DEA undercover agent made inquiries of each purchaser. The responses were then available as evidence or a source of investigative leads. As in Abscam, an entirely innocent person could have entered the storefront to be tested by the DEA undercover agents in front of hidden video cameras and microphones. Operations such as this are troublesome even if they do not risk entrapment, because the privacy of innocent people is invaded. (*Id.* at 44–47 (testimony of Oliver B. Revell).)

Like the DEA, the Immigration and Naturalization Service is targeted towards one particular type of crime and not a broad spectrum of criminals. The Select Committee examined one INS operation in which an undercover agent went to the border and joined illegal immigrants on a truck that was transporting them to Chicago. The Director of the INS Office of Anti-Smuggling Activity, Humberto E. Moreno, testified that this case was typical of his agency's undercover operations. He stated that most of the INS's undercover operations are directed against smugglers of undocumented aliens. Undercover agents pose as transporters, drivers, and in may cases undocumented aliens themselves. Agents who assume the role of undocumented aliens identify drop houses and safe houses throughout the routes and identify the people involved. Other roles played by INS undercover agents are as members of families trying to recover children who have been kidnapped by smugglers and as ranchers or entrepreneurs who want undocumented workers. Moreno stated that the use of undercover agents by the INS is not a recent phenomenon and "has been going on for many years." He added that the agency is broadening its efforts and increasing its undercover capacity and techniques. (*Id.* at 70–72 (testimony of Humberto E. Moreno).)

The INS does not yet have guidelines for its undercover operations, although Moreno testified that there were "some interim position papers on the use of undercover activity." The Select Committee reviewed documents from the Dallas office that set forth extensive policy guidance for undercover operations, but differed substantially from the FBI guidelines. Moreno stated that the INS was preparing similar guidelines for submission to the Justice Department's Criminal Division. Like the DEA Chief Counsel, Moreno expressed the view that the FBI undercover operations guidelines should not be made applicable to his agency in all respects because of "the difference in the kind of work that the FBI does." He said that when an Immigration Service operation runs across evidence of kidnapping, peonage or involuntary servitude, or other crimes in FBI jurisdiction, the FBI is contacted and the two agencies work together. (*Id.,* at 69–70.)

The Select Committee found that, despite the differences among the FBI, the DEA, and the INS, there should be consistent guidelines for undercover operations for all components of the Department of Justice. The testimony that both the DEA and the INS regularly develop evidence of crimes requiring joint operations with the FBI suggests the importance of having compatible guidelines from the outset. This does not mean that all the administrative details need to be uniform, but only that sensitive policy issues should be addressed and resolved within a common framework established by the Attorney General.

CHAPTER EIGHT—RECOMMENDATIONS FOR LEGISLATION

I. A RECOMMENDATION FOR LEGISLATION AUTHORIZING UNDERCOVER OPERATIONS AND EXEMPTING FBI, DEA, AND INS FROM RESTRICTIONS THAT UNDULY IMPEDE EFFECTIVE USE OF THE UNDERCOVER TECHNIQUE

The Congress, through its appropriate committees, should consider legislation that—

1. expressly authorizes the FBI, DEA, and INS to conduct undercover operations pursuant to guidelines established and maintained by the Attorney General;

2. requires the Attorney General to issue, maintain, and enforce guidelines governing all undercover operations, and that requires the undercover guidelines to specify at least the following:

(a) the procedures to be followed to initiate and to renew the authorization for an undercover operation;

(b) the procedures to be followed to extend the time, increase the funds, or expand the geographic or subject-matter scope of an undercover operation;

(c) the procedures to be followed to terminate an undercover operation;

(d) the standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover operation should be initiated, extended, renewed, expanded, given increased funds, or terminated;

(e) the standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover agent may offer or cause to be offered to another person an opportunity to commit a crime;

(f) the functions, powers, composition, and voting procedures of an Undercover Operations Review Committee having at least six voting members, at least one of whom is an Assistant Director of the FBI and at least one of whom is a representative of the Office of Legal Counsel of the Department of Justice;

3. requires the Attorney General to submit in writing to the Senate Committee on the Judiciary and the House Committee on the Judiciary, at least 30 days before it is promulgated, every guideline governing undercover operations, informants, or criminal investigations, and every amendment to, or deletion or formal interpretation of, any such guideline;

4. expressly authorizes the FBI, DEA, and INS, when reasonably necessary to the successful implementation of an authorized undercover operation,

(a) to purchase or lease property, supplies, services, equipment, buildings or facilities, or to construct or to alter

buildings or facilities, or to contract for construction or alteration of buildings or facilities, in any State or in the District of Columbia, without regard to statutes, rules, and regulations specifically governing contracts, contract clauses, contract procedures, purchases, leases, construction, or alterations undertaken in the name of the United States;

(b) to establish and to operate proprietaries;

(c) to use proceeds generated by a proprietary established in connection with an undercover operation to offset necessary and reasonable expenses of that proprietary; provided, however, that the balance of such proceeds, and proceeds derived from the sale of the proprietary or of its assets, must be deposited in the Treasury of the United States as miscellaneous receipts; provided, further, that proceeds from such a proprietary may not be used to offset any other expenses of the undercover operation, and that all proceeds recovered or generated other than by the proprietary must be deposited in the Treasury of the United States as miscellaneous receipts;

(d) to deposit, in banks or in other financial institutions, funds appropriated by Congress for undercover operations; and

(e) to engage the services of cooperative individuals or entities in aid of undercover operations, and, upon the prior written approval of the Attorney General or of the Deputy Attorney General, to execute agreements to reimburse those individuals or entities for their services and for losses incurred by them as a direct result of such operations;

5. requires the Attorney General annually to submit to the Senate Committee on the Judiciary and to the House Committee on the Judiciary a written report on all undercover operations (A) that were terminated during the preceding calendar year, or (B) that were terminated during any prior year and in which, during the calendar year preceding the report, the operations resulted in an arrest, an indictment, a jury verdict, a sentence, a judgment of dismissal, a judgment of acquittal, or an appellate court decision, or (C) that were first approved by FBI HQ more than two years before the date of the annual report, with the annual report to contain at least the following information for each such operation:

(a) the date on which initiation of the operation was approved under the undercover guidelines;

(b) the identity of the ranking person who granted approval to initiate the operation;

(c) the number of special agents who worked as undercover agents in the operation during each year of the operation's existence;

(d) each date on which an extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation was approved under the undercover guidelines;

(e) the identity of each ranking person who approved each extension of time, increase of funds, or expansion of geo-

graphic or subject-matter scope of the operation under the undercover guidelines;

(f) the date on which termination of the operation was approved under the undercover guidelines;

(g) the identity of the ranking person who approved the termination of the operation;

(h) the date on which the operation terminated and the manner in which termination was effected, including the manner in which the operation was made known to the news media;

(i) the arrest made in the operation during each year of the operation, including the identity of each person arrested and each crime for which he was arrested;

(j) the indictments issued as a result of the operation during each year of the operation, including the identity of each person indicted and each crime for which he was indicted;

(k) the expenses incurred, other than for salaries for employees of the United States Government, in the operation in each calendar year preceding the report;

(l) a description of each jury verdict, sentence, judgment of dismissal, judgment of conviction, and appellate court decision rendered or imposed as a result of the operation.

The Select Committee recommends that the Congress consider legislation that expressly authorizes the FBI, the Drug Enforcement Administration ("DEA"), and the Immigration and Naturalization Service ("INS") to conduct undercover operations pursuant to guidelines established and maintained by the Attorney General. This legislation should exempt the FBI, DEA, and INS from several legal restrictions that generally apply to agencies of the government and that could, if strictly enforced, unduly impede effective use of the undercover technique. In order to enable the Congress to exercise its oversight responsibilities, however, such authorizing legislation should be accompanied by legislation requiring that the Attorney General annually submit to the House and Senate Judiciary Committees a written report on terminated undercover operations and long-running undercover operations.

A. Statutory Authority For Undercover Operations

The Select Committee concludes that the law enforcement components of the Department of Justice that conduct undercover operations to detect federal criminal violations should have express statutory authority to do so. Authority for undercover operations may be implicit in the Attorney General's statutory mandate to appoint officials to detect and prosecute federal crimes (28 U.S.C. § 533 (1976)); but it is unseemly that the arm of government bearing primary responsibility for enforcing the nation's laws should have to rely on strained interpretations of various statutes in order to employ a crucial law enforcement technique.

In order to establish, to furnish, and to maintain secure cover for FBI personnel or informants, for example, it is necessary to make false representations to third parties and otherwise to use techniques of deception to conceal government involvement in the operation. Passports, drivers' licenses, other personal identification papers, and a vast range of other documentation must be forged to build effective cover. State laws frequently must be disregarded, and federal laws must be construed very loosely to permit these practices that are integral to the conduct of undercover operations. Although the Attorney General has authorized the use of undercover operations and funds have been appropriated for such operations by Congress, such operations lack the legitimacy that comes from clear and direct legislative authorization. Indeed, if attacked by an appropriate party in a judicial proceeding, such operations might be found to be unauthorized.

The FBI and other components of the Department of Justice should have the explicit endorsement of Congress if they are to continue their extensive and growing use of undercover operations. At the same time, however, the Select Committee concludes that this authority should not be granted independently of the standards and guidelines requirements needed to establish a complete framework of legislative policy and accountability for undercover operations. Congress has provided almost no policy guidance to the FBI or to the Department of Justice in this area. The courts examine undercover operations solely in the context of, and from the point of view of, the rights of criminal defendants in particular cases. The judiciary, therefore, is unable to address any significant aspects of the use of undercover techniques, because questions of proper management and control frequently lie outside the courts' purview. For example, the privacy and reputation of individuals who are never prosecuted can be adversely affected by an undercover operation, and they may have no recourse in the courts. Only the Congress can make a comprehensive, independent assessment of all dimensions of the use of undercover techniques by federal law enforcement agencies.

B. Attorney General's Guidelines

Since 1975 four Attorneys General under three Administrations have undertaken to develop and to maintain guidelines for the FBI and for other investigative agencies in the Department of Justice. FBI Director William H. Webster and his predecessor, Clarence M. Kelly, have welcomed such guidance and have worked closely with each Attorney General to ensure that the guidelines are workable and responsive to concerns for privacy and accountability. While some revisions in current FBI guidelines are desirable, the Select Committee commends the responsible officials who have maintained this commitment to the articulation of standards for the exercise of the vast discretionary powers of federal law enforcement agencies. That commitment should not, however, depend entirely on the policy inclinations of the particular individuals who may be appointed in future years to high positions in the Department of Justice.

The Select Committe recommends that legislation authorizing undercover operations by components of the Department of Justice should require the Attorney General to issue, to maintain, and to enforce guidelines governing all such operations. Those undercover guidelines should be required to specify:

(1) the procedures to be followed to initiate and to renew the authorization for an undercover operation;

(2) the procedures to be followed to extend the time, to increase the funds, or to expand the geographic or subject-matter scope of an undercover operation;

(3) the procedures to be followed to terminate an undercover operation;

(4) the standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover operation should be initiated, extended, renewed, expanded, given increased funds, or terminated;

(5) the standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover agent may offer or cause to be offered to another person an opportunity to commit a crime;

(6) the functions, powers, composition, and voting procedures of an Undercover Review Committee having at least six voting members, at least one of whom (in the case of FBI operations) is an Assistant Director of the FBI and at least one of whom is a representative of the Office of Legal Counsel of the Department of Justice.

The statutory requirement for Attorney General's guidelines would ensure that the standards and procedures for undercover operations continue to be the product of careful deliberation. Except for the most basic and essential threshold standards, discussed at pages 377–89 *infra,* the guidelines themselves need not now be legislated. Because statutory guidelines might inhibit needed administrative flexibility, legislation with respect to guidelines should, unless and until law enforcement agencies are shown to be unwilling or unable to formulate and administer adequate guidelines, focus on those aspects of undercover operations that demand the imprimatur of the Congress to sustain their legitimacy.

C. Notice of Changes in Guidelines

The Attorney General should be required to submit in writing to the House and Senate Judiciary Committees, at least 30 days before it is promulgated, every guideline governing undercover operations, informants, or criminal investigations and every amendment to, deletion from, or formal interpretation of, any such guideline.

This prior notification of Congress concerning FBI guidelines had been the general practice since such guidelines first were developed in 1976. The Select Committee recommends that such notice be required by statute and extended to all formal interpretations of the guidelines. The addition of formal interpretations is especially important in view of the Select Committee's discovery that the term "public official" in the FBI Undercover Operations Guidelines had been formally construed by the FBI to exclude many classes of government officials appointed or elected to high offices, that several other words and phrases in the guidelines had been given "interpretations" plainly inconsistent with their ordinary meanings, and that none of those "interpretations" had been submitted to the Judiciary Committees.

D. Exemptions from Restrictive Laws

In his testimony before the Select Committee, Director Webster urged passage of legislation exempting FBI undercover operations from certain laws that inhibit or foreclose the use of certain undercover techniques. He stated that "undercover operations pose unique problems that must be addressed by specific legislation," and he recommended that detailed undercover authority "be enacted into permanent law." He stated that the Department of Justice would be submitting appropriate legislation for consideration by the 98th Congress. Describing previous congressional consideration of this matter, Director Webster testified:

> As early as 1978, the FBI was authorized by the Department of Justice Appropriations Authorization Act, Fiscal Year 1979, to use appropriated funds to enter into leases, deposit appropriated funds and income from undercover operations in banks or other financial institutions, and use proceeds generated by undercover operations to offset necessary and reasonable expenses of the operations. In every succeeding year up to February 1, 1982, Congress has, by Authorization Act or continuing resolution, extended these authorities.
>
> Unfortunately, there have been lapses in the authorization process and consequently in our undercover authorities. The most serious of these has extended from February 1, 1982, to the present.
>
> It is clear that, while convenient, yearly authorization bills are not the appropriate vehicle for these undercover authorities. Too much is at stake. (Sel. Comm. Hrg., Sept. 30, 1982, at 19-20 (testimony of William H. Webster).)

The Select Committee agrees with the Director's points, as long as the permanent authority he seeks is coupled with the legislative standards discussed in the following sections.

The "unique problems" described by Director Webster as being posed by undercover operations were first called to the attention of Congress in 1978, when the Department of Justice submitted a proposed amendment to the authorization bill then pending. In a letter to the Senate Judiciary Committee, Acting Attorney General Benjamin R. Civiletti stated that, in the course of studying the legality of FBI undercover operations, the Department of Justice had "discovered several legal problems, arising out of the requirements relating to government procurement or the handling of public funds, which present substantial obstacles to the continued effective performance of undercover operations." He added that, unless corrective legislation were enacted, these legal problems would "require that current and proposed major operations be terminated, be substantially reduced in scope, or adopt practices which significantly reduce their effectiveness." The Acting Attorney General attached a memorandum from John M. Harmon, Assistant Attorney General for the Office of Legal Counsel, discussing the legal problems in greater detail.[1] The Select Committee has relied primarily on the Office of Legal Counsel memorandum and related materials for its understanding of the legal problems. FBI officials also provided information on the practical effects of these legal problems on the design and implementation of various types of undercover operations. The Select Committee finds that the concerns that justified legislative action on these matters in 1978 remain valid today.

---

[1] FBI Statutory Charter: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 248-65 (1978).

1. Procurement, leasing, and contracting

When reasonably necessary to the successful implementation of an authorized undercover operation, the FBI and other components of the Department of Justice should have the authority to purchase or to lease property, supplies, services, equipment, buildings or facilities, or to construct or to alter buildings or facilities, or to contract for construction or alteration of buildings or facilities, in any State or in the District of Columbia, without regard to statutes, rules, and regulations specifically governing contracts, contract clauses, contract procedures, purchases, leases, construction, or alterations undertaken in the name of the United States.

At least four problems arise under existing statutes relating to government contracting, leasing, and procurement. First, 31 U.S.C. § 665(a) and 41 U.S.C. § 11(a) prohibit federal agencies from entering into contractual obligations, unless appropriations are available to meet those obligations or unless they are authorized to do so by law. In the leasing area these statutes have been interpreted to prohibit leases that extend beyond the current fiscal year, unless such contracts are authorized by law or unless appropriations are available to meet those obligations. While the Office of Legal Counsel did not decide definitely in 1978 that these statutes prohibit multi-year leases for law enforcement undercover operations, it considered the question to be a very close one. In order to avoid the risk of illegality, the FBI must structure the operation in a manner that permits it to enter into month-to-month leases, enter into leases extending only to the end of the fiscal year, or look for other locations. These options may be unavailable for larger operations, because the lessors of large commercial property tend to require leases in excess of one year.[2]

A second problem results from 40 U.S.C. § 34, which prohibits leasing in Washington, D.C., without an appropriation for the lease's having "been made in terms by Congress." Another prohibition on rentals in Washington, D.C., is contained in 40 U.S.C. § 35. While the Office of Legal Counsel did not reach a conclusion in 1978, it suggested that the legal problems might require the FBI to conduct its operations in Washington, D.C., from space leased either in Maryland or in Virginia, thus raising credibility problems and practical difficulties that might render an operation altogether inadvisable.

Third, statutes such as 41 U.S.C. §§ 22, 254(a) and 254(c) require specified clauses to be inserted into government contracts. These clauses relate to prohibitions on contracts with members of Congress, payment of improper fees in soliciting or securing government contracts, and the Comptroller General's access to the contractor's or subcontractor's records. It is obvious that the inclusion of such clauses would disclose that a government agency was involved and would compromise an undercover operation requiring concealment of government affiliation. The Office of Legal Counsel concluded in 1978 that the FBI may enter into leases without including in the leases clauses usually required in government contracts. This determination was based on assurances from the FBI that it could operate satisfactorily under certain conditions necessary to ensure the legality of the contracts. The Office of Legal Counsel recommended that a specific legislative exemption be enacted because of "the broad language" of the pertinent statutory provisions.

---

[2] If a lessor requires advance payments, similar problems arise under 31 U.S.C. § 529 (1976) and 41 U.S.C. § 255 (1976).

The FBI also needs specific authority to purchase real property, because in cases involving undercover surveillance, there may be no choice as to the location. Two existing statutes may prevent the FBI from acquiring the necessary property: 40 U.S.C. § 255 requires a written opinion from the Attorney General that real property is purchased with clear title; and 40 U.S.C. § 606 requires that any acquisition of a public building valued over $500,000 be approved by resolution of the House and Senate Public Works Committees. Although such purchases have been made in the past based on opinions from the Department of Justice, statutory authority would confirm the legitimacy of these purchases.

While the problems with procurement, leasing, and contracting may not be as serious as those discussed below relating to proprietaries and bank deposits, they still unnecessarily inhibit undercover operations. Long-term leasing is a requirement for almost every significant FBI operation, and such leases frequently are needed for vehicles and other equipment, as well as for space. The FBI does not draw upon the vehicles and other equipment allocated for regular criminal investigations to supply the needs of an undercover enterprise. In the legislation that expired on February 1, 1982, the FBI could exercise its special leasing authority only upon the personal certification of the FBI Director and of the Attorney General or Deputy Attorney General that such authority was "necessary for the conduct of" an undercover operation. Despite the expiration of this statutory requirement, the Director and Deputy Attorney General continue to make these certifications as if the law were still on the books. The Select Committee does not believe such high-level approval requirements, triggered by a narrow technical legal issue, need to be included in permanent legislation that requires guidelines and standards for all undercover operations.

As discussed below, one of those requirements would be an annual report on closed operations. That report should cover the expenses, other than for salaries for employees of the United States, incurred in the operation in each calendar year preceding the report. When operations continue for longer than two years, a comparable report should also be made. These reports would provide an accounting for the expenditures on long-term leases or contracts, as well as for the purchase of property and services. The statute that expired on February 1, 1982, contained a comparable audit requirement for closed operations; and the FBI has continued to conduct such audits, despite the expiration of the statutory requirement.

It is to the credit of the FBI and the Department of Justice that the Congress was informed of these issues early in the development of more complex undercover FBI efforts and that clarifying legislation was requested to ensure the legality of FBI operations. With the termination of the special authorities, the FBI and the Department have been forced to choose between curtailing operations and relying on statutory interpretations in which the Office of Legal Counsel did not have complete confidence in 1978. If Congress expects the FBI to adhere strictly to applicable laws, reasonable steps should be taken to avoid placing the FBI in such a dilemma.

2. Proprietaries

The authority to establish and operate proprietaries is another example of this dilemma. Congress should provide such authority, even though the FBI and the Office of Legal Counsel in the Department of Justice believe they can circumvent current statutory requirements. Title 31, section 869(a) of the United States Code provides:

> No corporation shall be created, organized, or acquired on or after December 6, 1945, by an officer or agency of the Federal Government or by any Government corporation for the purposes of acting as an agency or instrumentality of the United States, except by an Act of Congress or pursuant to an Act of Congress specifically authorizing such action.

In a letter to the House Select Committee on Intelligence, dated January 23, 1976, the Department of Justice explained its conclusion that this statute does not apply to undercover proprietary corporations. In the Department's opinion, the statute was directed at the practice of incorporating agencies, exemplified by the Reconstruction Finance Corporation, overtly engaged in government functions. By contrast, the corporate purpose of an undercover proprietary is not to perform a government function, but to carry out commercial activities or to appear to be doing so. Thus, such corporations are not established "for the purpose of acting as an agency or instrumentality of the United States" within the meaning of the statute. Instead, their purpose is to avoid acting openly as a government agency.[3]

In 1979, at the request of the Senate Judiciary Committee, the American Law Division of the Congressional Research Service, Library of Congress, researched the issue and came to a different conclusion. Its opinion noted that the language of the statute "leaves little room for exception to its requirement;" and it advised that Congress "has, albeit without FBI law enforcement techniques in mind, outlawed such incorporation." [4] Consequently, while the explicit authority to establish proprietaries had not originally been requested by the Department of Justice in 1978, it was sought by Director Webster in 1979.[5] Congress included in the Justice Department Authorization Act for Fiscal Year 1980 the authority to establish or to acquire proprietary corporations or business entities as part of an undercover operation and to operate such corporations or business entities on a commerical basis, without regard to 31 U.S.C. § 869. There also was a requirement that, whenever such a proprietary with a net value over $50,000 was to be liquidated, sold, or otherwise disposed of, the FBI report the circumstances to the Attorney General and to the Comptroller General and deposit the proceeds (after obligations were met) in the Treasury of the United States. This provision, too, has lapsed.

---

[3] Office of Legal Counsel, Dept. of Justice, Explicit Authority for the FBI to Create Proprietaries (Apr. 13, 1979).

[4] K. Ronhovde, Congressional Research Service, The Library of Congress, The Authority of the Federal Bureau of Investigation to Incorporate an Enterprise in the Course of Conducting an Investigation (Mar. 16, 1979).

The Select Committee recommends permanent statutory authorization for the establishment of proprietaries by the FBI and, if requested by the Attorney General, by DEA and by INS. The requirements regarding disposition of proprietaries are covered by the recommendations on the use of income to offset expenses and annual reports to the Congress, discussed at pages 356–58 and 360–61 *infra.*

3. Use of income to offset expenses

The most important legal and practical problem that now exists because of the lapse of the special authority on February 1, 1982, concerns the disposition of moneys received in the course of FBI undercover activities. In 1978 the Office of Legal Counsel reached the conclusion that 31 U.S.C. § 484 requires that such moneys be paid into the Treasury. As the Office of Legal Counsel stated, this legal requirement has "a severe impact on both the scope and the credibility of FBI undercover operations." Expiration of the FBI's special authority has required the FBI to cease the practice of using the income from an undercover operation to offset its expenses. As a result, all the expenses of operations that involve the use of undercover businesses must be met out of FBI appropriations and cannot be defrayed by using the income generated by the particular business. Given the limited funds available, these operations necessarily had to be reduced in number or in scope.

The FBI appears to have no alternative. The option of increasing the FBI's budget is not within the FBI's control and is subject to the fiscal constraints that affect almost all domestic programs. Another alternative that has been used on occasion is for the FBI to associate with a private business. This option is not available, however, when the owners of businesses that would be useful to the FBI's investigations are unwilling to cooperate with the FBI. The FBI itself has been reluctant to adopt this approach, because of the problems of civil liability or dangers that might be created for the well-being of private individuals.

A second way in which the FBI uses income to offset expenses is in the gambling area. Agents involved in undercover activities frequently associate with persons who engage in various forms of gambling; the agent must also gamble if he is to maintain his credibility. It should be obvious that, even when fairly low sums of money are involved, the undercover agent's task is very complicated if the receipts from each winning hand or roll of the dice must go into the Treasury. Gambling also involves "averaging," and a gambler who cannot offset winnings against losses in a night of poker or a day at the racetrack would have inordinate expenses. Other problems might occur if the individual agent must later render an accounting of all of the various gambling transactions which took place. According to the FBI, the application of 31 U.S.C. § 484 to FBI operations requires its undercover agents generally to avoid gambling, with the consequent loss to those agents' credibility and access to criminal elements.

---

[5] *See* Letter from FBI Director William H. Webster to Representative Don Edwards (Apr. 27, 1979).

Since February 1, 1982, the FBI has been forced to cut back on ongoing operations because of the termination of the authority to use income to offset expenses. Operations like Bancoshares, which involved the laundering of large amounts of money acquired by narcotics traffickers, are impossible. When operations have continued, the legal problems have been an inhibiting factor on proposed scenarios. Even under the special authority that expired on February 1, 1982, there were problems because of the absence of permanent legislation and the consequent inability to make financial commitments. The ability to use income to offset the expenses of an operation can make certain kinds of undercover operations cost free. In some cases the FBI has been able to reuse the same money four or five times. The FBI has the resources and the expertise to develop operations that can combat crimes involving the movement of large amounts of money. Without the authority to use income to offset expenses, however, such operations are prohibitively expensive.

The legislation recommended by the Select Committee would alleviate this problem by allowing the FBI to use proceeds generated by a proprietary established in connection with an undercover operation to offset necessary and reasonable expenses of that proprietary. The balance of such proceeds, and proceeds derived from the sale of the proprietary or of its assets, would have to be deposited in the Treasury of the United States as miscellaneous receipts. Furthermore, the proceeds from such a proprietary should not be used to offset any other expenses of the undercover operation; and all proceeds recovered or generated other than by the proprietary would have to be deposited in the Treasury of the United States as miscellaneous receipts. This recommendation differs from the special authority that expired on February 1, 1982, which permitted use of the proceeds from an undercover operation to offset necessary and reasonable expenses incurred in that operation.

The Select Committee's recommendation is based on its finding that an undercover operation may be so extensive and may change direction so significantly that the authority for self-sustaining operations should not be unlimited. Small-scale FBI operations, involving no more than two or three undercover agents engaged in a variety of separate, interrelated enterprises, may suffer under this limitation. The Select Committee expects, however, that the term "proprietary" will be construed with reasonable flexibility for unincorporated enterprises. The initial and ever-widening breadth of Abscam and Goldcon sharply demonstrate that this limitation is vitally necessary.

In the current period of fiscal stringency, the savings likely to result from this legislation are especially important for the conduct of proper and effective FBI undercover operations. The failure of the Congress to renew the special authority that temporarily resolved this problem before February 1, 1982, was the equivalent of a substantial reduction in the funds available for FBI undercover operations. The Select Committee has found that scarce resources not only limit the effectiveness of FBI operations against crime, but also make it far more difficult for FBI agents in the field to comply adequately with strict recordkeeping and management requirements that protect the rights of individuals and ensure accountability for the conduct of operations. Unless Congress is willing to appropriate funds to make up the difference, inaction on this issue has the effect of telling the FBI that Congress does not support undercover operations. The Select Committee believes that such inaction is neither justified by the record nor representative of the views of the majority of the Congress.

4. Bank deposits

In the course of an undercover operation, it sometimes becomes necessary for the FBI to deposit public funds in a bank. This may happen in several different situations. First, funds may be deposited to maintain and support undercover agents or off-site surveillance teams or equipment so that these entities will not be identified with the FBI. Second, businesses established by the FBI must deposit funds in banks in order to operate as any commercial enterprise would. Finally, in white-collar crimes and organized crime investigations, frequently individuals with whom the FBI is dealing require FBI undercover agents to demonstrate their financial ability to participate in transactions involving large amounts of cash, such as in cases involving the purchase of stolen securities. To do this the FBI must deposit large sums in banks to permit the undercover agent to verify his financial resources.

Although these practices appear to violate the plain language of 18 U.S.C. § 648 and 31 U.S.C. § 521, the Office of Legal Counsel of the Department of Justice concluded in 1978 that the FBI might deposit funds in banks under certain circumstances without violating the statutes. The rationale that justified this conclusion did not, however, extend to certain large deposits needed to conduct successfully particular types of white collar and organized crime investigations. The legality of the FBI's practice of depositing public funds in banks depended on whether the FBI could ensure that the funds were fully safeguarded. In certain cases where the FBI needs to display large financial resources, however, the limitations necessary to comply with the statutes would frustrate the undercover operation. Even the limited operations that can be conducted consistent with the statutes may be short-lived, because sophisticated criminals may be able to identify them as FBI tactics.

The goals underlying the bank deposits statutes—guarding against favoritism among banks, ensuring that the government has funds available when needed, and preventing overexpansion of bank notes—do not seem threatened by the FBI's practice. The statute's major objective—safeguarding public funds—need not be pursued so rigorously as to prevent the FBI from undertaking the types of undercover operations needed to combat more sophisticated criminal enterprises.

5. Indemnification of cooperating parties

In his testimony before the Select Committee, Director Webster stressed the need to enact legislation giving the FBI authority to enter into agreements to indemnify cooperating parties:

> Participation in undercover operations by persons engaged in various professions and business pursuits is vital to the success of FBI undercover operations. The cooperation extended by legitimate businesses has assured our agents the necessary cover and credibility in carrying out their undercover mission. For example, various banks have provided wire transfer service of large sums of money in narcotics investigations, such as Bancoshares. Airlines, investment corporations, oil companies, and other responsible business entities have made it possible to successfully investigate and prosecute complicated economic crimes, public corruption, and labor racketeering cases that would otherwise be unapproachable due to the necessity of being an "insider" to illegal activity.
>
> In return for the services provided to the FBI by these legitimate concerns, an indemnification agreement is often sought by the cooperating party. They seek assurances that the FBI or the Department of Justice will defend all actions for damages arising out of acts of agents of the FBI or activities initiated by the cooperative party in furtherance of the undercover operation.
>
> Cooperative parties presently assume economic and professional risks on behalf of the government, and, in return, the FBI can only offer them one-sided personal service agreements. These agreements generally minimize the obligations and liability of the government but provide little protection to the individual. Potential civil liability often influences a decision to assist the government. (Sel. Comm. Hrg., Sept. 30, 1982, at 20-21 (testimony of William H. Webster).)

Director Webster added that the Department of Justice is considering the possibility of legislation to address this problem. The Select Committee recommends that such legislation be included in the permanent statutory authorization for FBI undercover operations.

Historically, certain general principles have applied to indemnification agreements by the government: obligations that have been indefinite, uncertain, and of limited nature have consistently been regarded as objectionable, in the absence of express statutory authority to the contrary.[6] Additionally, an agreement, entered into by an authorized government official, making the government liable for damages in an indefinite and unlimited amount is null and void.[7] Following these general principles that the government should not oblige itself to write a "blank check" for an unspecified amount when entering such agreements, legislation authorizing the FBI to enter into indemnification agreements should require the specific approval of each agreement by the Attorney General or by the Deputy Attorney General. Consideration might also be given to adding a statutory ceiling on the amount of liability assumed by the government per agreement and per fiscal year.

---

[6] 7 Comp. Gen. 507 (1928); 8 Comp. Gen. 647, 648 (1929); 35 Comp. Gen. 85, 87 (1955).

[7] *Id.*

The need for this indemnification authority is clearly supported by the unfortunate experience of a cooperating party in one of the FBI undercover operations examined by the Select Committee. In the undercover operation known as Frontload an insurance company that provided the FBI with essential assistance suffered serious financial losses as a result of fraud perpetrated by the individual whom the FBI initially used as its principal informant. While special arrangements could be made in that case to compensate the firm, the experience illustrates the risks that cooperating businesses may face if they accede to the FBI's request for assistance. The Select Committee believes that private citizens and business firms who decide to cooperate with the FBI in the conduct of an undercover operation should not be forced to confront possible dangers without the firm prospect of help from the government if those dangers materialize.

E. Annual Reports To Congress

The rapid expansion of FBI undercover operations represents a dramatic shift in FBI practices and priorities. This shift was well underway before the Abscam prosecutions led both Houses of Congress to study in depth the growth of FBI undercover operations. The FBI has now fully incorporated undercover operations into its arsenal of crime-fighting techniques, and the DEA and the INS plan to expand their use of more complex undercover techniques. These developments make it especially necessary for Congress to exercise its oversight function vigorously so that this powerful law enforcement weapon does not lose its legitimacy through carelessness or abuse. In his testimony before the Congress in the past several years, Director Webster consistently has recognized the importance of this oversight function.

The Select Committee recommends the establishment of permanent oversight arrangements through a statutory requirement that the Attorney General annually submit to the House and Senate Committees on the Judiciary a written report on all undercover operations closed during the preceding calendar year. The report also should cover operations that have continued for longer than two years and operations that were terminated during any prior year and in which, during the calendar year preceding the report, the operation resulted in an arrest, an indictment, a jury verdict, a sentence, a judgment of dismissal, a judgment of acquittal, or an appellate court decision. The report should contain at least the following information for each operation:

(1) The date on which initiation of the operation was approved under the undercover guidelines;

(2) The identity of the ranking person who granted approval to initiate the operation;

(3) The number of special agents (or comparable employees of other Justice Department components) who worked as undercover agents in the operation during each year of the operation's existence;

(4) Each date on which an extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation was approved under the undercover guidelines;

(5) The identity of each ranking person who approved each extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation under the undercover guidelines;

(6) The date on which termination of the operation was approved under the undercover guidelines;

(7) The identity of the ranking person who approved the termination of the operation;

(8) The date on which the operation terminated and the manner in which termination was effected, including the manner in which the operation was made known to the news media;

(9) The arrests made in the operation during each year of the operation, including the identity of each person arrested and each crime for which he was arrested;

(10) The indictments issued as a result of the operation during each year of the operation, including the identity of each person indicted and each crime for which he was indicted;

(11) The expenses incurred, other than for salaries for employees of the United States Government, in the operation in each calendar year preceding the report;

(12) A description of each jury verdict, sentence, judgment of dismissal, judgment of conviction, and appellate court decision rendered or imposed as a result of the operation.

The legislation that expired February 1, 1978, contained a requirement that the FBI conduct detailed financial audits of closed undercover operations and report annually to the Congress concerning these audits. The Select Committee's recommendation would expand this annual reporting requirement to cover the overall duration of the operation, the officials responsible for its initiation and termination, and the results achieved by the operation. The recommendation that the report include operations that have continued for longer than two years should not impose an undue burden, because the FBI already audits ongoing operations every 18 months, as well as upon closing. Most FBI operations are terminated after six months or a year.

The Select Committee finds this requirement to report on long-running operations is necessary to ensure accountability. In at least one instance, an FBI operation has gone on for seven years, and this suggests the importance of reporting more than just closed operations. Of course, arrangements would be required to protect the confidentiality of information on such active operations. The Select Committee urges the Judiciary Committees to carry forward the bipartisan mandate for oversight of undercover operations that the Senate gave the Select Committee in Senate Resolution 350.

II. A RECOMMENDATION FOR ENTRAPMENT LEGISLATION

The Congress, through its appropriate committees, should consider legislation specifically creating an affirmative defense of entrapment, providing for the acquittal of a defendant when a federal law enforcement agent, or a private party acting under the direction of or with the prior approval of federal law enforcement authorities, is shown by a preponderance of the evidence to have induced the defendant to commit an offense, using methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense. This legislation should establish entrapment per se when it is shown by a preponderance of the evidence that the defendant committed the crime—

1. *because of a threat of harm, to the person or property of any individual, made by a federal law enforcement agent or by a private party acting under the direction of or with the prior approval of federal law enforcement authorities;*
2. *because federal law enforcement agents manipulated the defendant's personal, economic, or vocational situation to increase the likelihood of his committing that crime; or*
3. *because federal law enforcement agents provided goods or services that were necessary to the commission of the crime and that the defendant could not have obtained without government participation.*

While the various sets of guidelines issued by the Attorney General administratively limit the activities of some federal law enforcement officials, the only judicially enforceable constraints on federal undercover operations are the court-created doctrine of entrapment and the constitutional requirement of due process of law. Undercover operations in which FBI operatives both disguise their true identities and offer to private parties inducements to commit crimes are almost always attended by potential problems arising under those two doctrines. As the number of such operations has increased, therefore, it has become particularly important that the entrapment and due process constraints function effectively. The Select Committee finds, however, that the current entrapment doctrine fails to meet that requirement; that nearly unanimous disapproval by legal scholars of the current entrapment doctrine is sound; that due process principles do not adequately make up for the deficiencies of the entrapment doctrine; and that Congress should accept the Supreme Court's invitation to legislate in this area.[8]

---

[8] See *United States* v. *Russell*, 411 U.S. 423, 433 (1973), in which the Court stated, "Since the defense [of entrapment] is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." Codification and modification of the entrapment doctrine was first proposed in 1971 by the U.S. National Commission on the Reform of Federal Criminal Laws ("National Commission"). The original version of the proposed revised criminal code, which was inspired in part by the National Commission proposals, suggested codification of the entrapment doctrine in its present form, disregarding the National Commission's proposed modifications. (S. 1, 94th Cong., 1st Sess. § 551 (1975).) The most recent version of the revised criminal code, however, has followed neither of those courses, dealing generally with defenses by declaring simply that "the existence of a defense or affirmative defense to a prosecution under any federal statute, including a defense . . . [of] unlawful entrapment . . . shall be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience." (S. 1630, 97th Cong., 2d Sess. § 501 (1981).) In choosing to retain the

Continued

A. Existing Law

1. Entrapment

The entrapment defense has changed little since the Supreme Court created it in 1932. It is not a constitutionally based doctrine; rather, it is a limitation that the Court, based on its belief that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations" (*Sherman* v. *United States,* 356 U.S. 369, 372 (1958)), has found to be implicit in every federal criminal statute. In brief, the Court has determined that, if he was induced to commit his crime by a government agent, a defendant may not be convicted of having violated a federal criminal statute unless he was previously disposed to engage in similar criminal activity. If the accused produces evidence demonstrating that the undercover agent induced him to commit the charged offense, the government must establish beyond a reasonable doubt that the defendant was predisposed towards criminal conduct. To meet this burden the prosecution may introduce evidence relating to the defendant's character, reputation, prior bad acts, and prior convictions. (*Osborn* v. *United States,* 385 U.S. 323, 332 n. 11 (1966).) Whether the defendant was predisposed is a question of fact to be resolved by the jury. (*Sherman* v. *United States,* 356 U.S. at 377 n. 8.)

Thus, the entrapment doctrine in its present form purports to focus largely on the defendant's state of mind. As Chief Justice Hughes declared for the Supreme Court when creating the doctrine, "[T]he controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." (*Sorrells* v. *United States,* 287 U.S. 435, 451 (1932).) In other words, the Court has attempted to articulate an entrapment defense that will draw a line between "the unwary innocent," who may not be convicted when lured into criminal activity by a federal agent, and the "unwary criminal," who has no defense under such circumstances. (*Sherman* v. *United States,* 356 U.S. at 372.) The Court recently reaffirmed this formulation of the doctrine in *United States* v. *Russell,* 411 U.S. 423 (1973), and in *Hampton* v. *United States,* 425 U.S. 484 (1976).

In a series of concurring and dissenting opinions, however, several of the Justices have disputed the majority's entrapment analysis. These Justices have challenged the fiction underlying the majority's opinions: that Congress tacitly intended the Court-articulated entrapment defense to be implicit in every federal criminal statute. Instead, they would bar prosecution of certain "induced" offenses as an exercise of the Supreme Court's supervisory power.

More fundamentally, these Justices have rejected the majority's focus on the individual defendant's state of mind, arguing that "a person's alleged 'predisposition' to crime should not expose him to government participation in the criminal transaction that would be

---

court-created approach to entrapment, the Committee on the Judiciary observed that it, "like the National Commission and virtually every other principal criminal code reform body in modern times, believes that the legislative codification of general defenses and bars to prosecution may be desirable in the future." (S. Rep. No. 97-307, 97th Cong., 2d Sess. 91 (1981).)

otherwise unlawful." (*United States* v. *Russell,* 411 U.S. at 444 (Stewart, J., dissenting).) The minority Justices have advocated an objective test for entrapment, which would "shif[t] attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime." (*Sherman* v. *United States,* 356 U.S. at 384 (Frankfurter, J., concurring in the result).) This position has been endorsed by the vast majority of legal commentators,[9] by the American Law Institute,[10] and by the U.S. National Commission on Reform of Federal Criminal Laws ("National Commission").[11]

The persistence of criticism aimed at the Supreme Court majority's approach is understandable. The Court's reliance on implied Congressional intent does rest upon an obvious fiction,[12] since Congress has never expressed any intention to create such a doctrine. More fundamentally, the prevailing entrapment doctrine is, as jurists have frequently observed, unjustifiable in theory and often perverse in practice.

The Court's majority opinions, for example, repeatedly have suggested that an entrapped defendant who was not predisposed to commit the crime is in some sense not culpable and therefore is an "innocent" who does not warrant punishment. (*E.g., United States* v. *Russell,* 411 U.S. at 434–436; *Sherman* v. *United States,* 356 U.S. at 372, 373, 376; *Sorrells* v. *United States,* 287 U.S. at 451.) But such an individual has by definition violated a criminal statute, with the requisite criminal intent. While one who commits an illegal act under duress may be acquitted under traditional principles of excuse or justification, there is no coercion when the defendant simply takes advantage of criminal opportunities offered by third parties; that is why defendants who succumb to criminal temptations—even unusually large temptations—offered by private actors are treated in all cases as culpable. (*See United States* v. *Twigg,* 588 F.2d 373, 376 (3d Cir. 1978); *United States* v. *Garcia,* 546 F.2d 613, 615 (5th Cir.), *cert. denied,* 430 U.S. 958 (1977).) Accordingly, the defendant's moral blameworthiness cannot be affected by the tempter's hidden identity as a federal agent;[13] irrespective of the identity of the tempter, the defendant intended to commit the act and knew the act to be wrongful. Thus, whatever the wisdom of the government's tempting such an individual may be, it is far from clear that, simply because a person who committed an otherwise criminal act was not "predisposed" to commit the crime, he should be acquitted as innocent. The entrapment defense should rest on a more logical base.

---

[9] Most of this literature is collected at Park, *The Entrapment Controversy,* 60 Minn. L. Rev. 163, 167 n. 13 (1976). *See generally* Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain,* 84 Yale L.J. 683 (1975); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution,* 28 Fordham L. Rev. 399 (1959).

[10] *See* American Law Institute, Model Penal Code § 2.13 (Official Draft 1962), prohibiting "methods of persuasion or inducement which create a substantial risk that . . . an offense will be committed by persons other than those who are ready to commit it."

[11] *See* National Commission, A Proposed New Federal Criminal Code § 702(2) (1971), which prohibits "using persuasion or other means likely to cause normally law-abiding persons to commit the offense."

[12] As Justice Frankfurter noted,

> It is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers or informers because "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." In these cases raising claims of entrapment, the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged. That conduct includes all the elements necessary to constitute criminality.

(*Sherman* v. *United States,* 356 U.S. at 379 (Frankfurter, J., concurring in the result).)

[13] It never has been the law that conduct is "less criminal because the result of temptation, whether the tempter is a private person or a government informer or agent." (*Sherman* v. *United States,* 356 U.S. at 380 (Frankfurter, J., concurring in the result).)

More sensibly, therefore, the Court also has suggested that the entrapment doctrine serves as an exclusionary rule designed to discourage undesirable or overzealous police tactics. (*See, e.g., Sorrells* v. *United States,* 287 U.S. at 446.) Unfortunately, the Court has made almost no effort to explain which forms of law enforcement conduct are undesirable and precisely why they should be avoided. This omission is important, because the law enforcement activities circumscribed by the entrapment doctrine are, with rare exceptions, neither unconstitutional (*see, e.g., United States* v. *White,* 401 U.S. 745 (1971) (plurality opinion); *Hoffa* v. *United States,* 385 U.S. 293 (1966)) nor violative of the statutory law; indeed, law enforcement activities can lead simultaneously to the conviction of certain defendants (the predisposed) and the acquittal of others (the nonpredisposed). This illustrates the peculiarity of using the entrapment defense as a deterrent: if the purpose of the entrapment doctrine is to discourage particular forms of police conduct, it is odd that the test created by the Court looks to the defendant's state of mind, not to the police activity.

The undesirability of one form of police conduct does seem certain, although the Court has failed to articulate it: police should refrain from offering inducements that are significantly larger than those actually proffered under similar circumstances in the real world or that are attractive enough to persuade virtually anyone in similar circumstances to commit a crime.[14] If similarly situated citizens are unlikely to face equivalent temptations, or if no one similarly situated reasonably can be expected to resist the proffered temptation, it is pointless for law enforcement operations to use inducements of that nature and magnitude: the police will not thereby prevent any crime that was likely to occur, and there is no assurance that they will catch only persons inclined to deviant criminal behavior.

Unfortunately, the existing entrapment doctine fails to further even these sound efficiency concerns. The entrapment inquiry now focuses on the defendant's predisposition, rather than on the police conduct. As a result, the conviction of a predisposed defendant will stand even if he was lured into criminality through the offer of a wildly unrealistic inducement to which most people would have succumbed. Conversely, a defendant snared through the use of reasonable and otherwise proper police methods must be acquitted if he is found not predisposed. These results can hardly provide an intelligible or coherent guide to police behavior. Indeed, the predisposition requirement most likely leads the police to concentrate their attention on individuals with criminal records, for whom predisposition is easy to demonstrate; such individuals may be subjected to virtually any inducement with impunity. As Justice Frankfurter argued, however,

---

[14] Philip B. Heymann, when he was Assistant Attorney General, testified that this principle was used as a safeguard by the Department of Justice in 1980 and earlier in undercover operations. (*See* FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. 138–40 (1980) (testimony of Philip B. Heymann).)

> Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. . . . Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. (*Sherman* v. *United States*, 356 U.S. at 383 (Frankfurter, J., concurring in the result); *see United States* v. *Russell*, 411 U.S. at 443-44 (Stewart, J., dissenting).)

When it is closely examined, in fact, it becomes evident that the predisposition concept will not constrain police activity in a meaningful way. In modern practice "predisposition" means little more than *present* willingness to commit crime; it hinges on whether "the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded." (1 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 13.09, at 364 (3d ed. 1977).) This definition makes no reference to the size or character of the offered inducement. On its face, then, the existing definition seemingly permits a finding that any defendant who commits any crime in response to any inducement is predisposed, because such a defendant has, by accepting the inducement, demonstrated his willingness to engage in illegal conduct. (*See* Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 Sup. Ct. Rev. 111, 118-19, 124-26.) It may be likely that a jury would find that a defendant had been entrapped if a huge inducement had been offered to commit some trivial offense (for example, $5 million to double-park), but such a jury surely would be motivated not by the articulated predisposition principle, but by outrage at the police conduct.

The existing law of entrapment is flawed for another reason. A defendant who argues entrapment must take his case to the jury, giving the prosecution the opportunity to attempt to establish predisposition by offering evidence of prior bad acts, of poor character, and of shady reputation—the very sort of evidence generally excluded from criminal trials for fear of prejudicing the jury. Such information is in some sense relevant to establishing the likelihood that the defendant would have engaged in crime with little temptation by a third party (*see* Park, *supra* p. 364 note 9, at 257); but, given the essentially circular nature of the predisposition inquiry, admitting such evidence inevitably will lead even conscientious juries to condemn defendants with shady pasts simply for being "bad," rather than for having been proved to have committed the crime charged.[15] Results of this type cannot contribute to the principled or evenhanded administration of justice.

---

[15] Several courts have recognized this danger and have responded by excluding unduly prejudicial evidence. (*See United States* v. *Ambrose*, 483 F.2d 742, 748 (6th Cir. 1973), and cases cited

Continued

As a theoretical matter, it does seem sensible to allow the offer of inducements to individuals who are engaging in or affirmatively are planning to engage in criminal conduct, while forbidding it as to others.[16] But such an approach seems unworkable in practice, given the subjective nature of the determination involved; and it is not, in any event, the line currently drawn by the predisposition concept. Indeed, these difficulties are illustrated by the definition of entrapment most recently articulated by the Supreme Court. "It is only when the Government's deception actually implants the criminal design in the mind of the defendant," the Court declared in *Russell,* "that the defense of entrapment comes into play." (411 U.S. at 436.) Yet the government's creation and implantation of the illicit idea cannot be all there is to it, for in a substantial number of undercover operations the government concocts the criminal proposal and "implants" it in the mind of the target; indeed, that will be the case almost every time the government offers an inducement to commit a crime.

Pointing out these defects, it should be added, is not to say that the entrapment doctrine in its present form fails to serve any useful purpose. It is arguable, for example, that a potential defendant's "predisposition"—or, in any event, his participation in an ongoing criminal enterprise—bears on the tactics the police might reasonably use in seeking to obtain his conviction. (*See* Park, *supra* p. 364 note 9, at 216). The entrapment doctrine also offers the jury a formal method for disapproving unreasonable or overbearing police tactics. The fact remains, however, that the present entrapment doctrine is incoherent in principle, and will, therefore, inevitably be inconsistent in application.

2. Due process

While a majority of the Supreme Court has maintained that the entrapment defense is based on subjective factors, the Court also has hinted that there may be constitutionally based objective constraints on police undercover activities. This possibility was first suggested in 1973 in *Russell* v. *United States,* where the Court rejected the defendant's entrapment plea because predisposition had been established. In dictum Justice Rehnquist wrote for the Court that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, *cf. Rochin* v. *California,*

---

therein; Park, *supra* p. 364 n. 9, at 251-52.) These protections can go only so far, however; Fed. R. Evid. 405(a) allows the admission of reputation and opinion testimony when character is in issue, and virtually all background evidence relating to predisposition inevitably will be prejudicial to a degree.

[16] The former individuals presumably are particularly dangerous and are the ones most likely to become involved in criminality absent government involvement. It is entirely possible, however, that law enforcement officials will have good reason to direct undercover operations at those who have been or are likely to be offered private inducements. As Professor Seidman notes,

> The argument that a nondisposed defendant is not dangerous because he lacked the disposition to commit the offense before the government intervened is not convincing. As cases such as *Sherman* prove, a person lacking a criminal disposition may nonetheless be quite likely to commit crimes. Indeed, the very fact that an entrapped defendant accepts an inducement conclusively proves that he poses the risk of committing the offense whenever a similar inducement might be offered in the future.

Seidman, *supra* p. 366, at 141.

342 U.S. 165 (1952)." (411 U.S. at 431-32.) The Court thus acknowledged that certain police activity might be constitutionally prohibited as "'shocking to the universal sense of justice.'" (411 U.S. at 432, *quoting Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246 (1960).) But the Court concluded that the facts of *Russell*—where the defendant had been convicted of producing methamphetamine after federal agents had provided him with chemicals used in the manufacturing process—did not implicate the constitutional principle.

Unfortunately, the nature, and even the existence, of this due process limitation remains in considerable doubt. Three years after *Russell* had been decided, Justice Rehnquist, writing for himself, the Chief Justice, and Justice White, appeared to repudiate the *Russell* dictum, declaring that "[t]he remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment." *(Hampton* v. *United States,* 425 U.S. 484, 490 (1976) (plurality opinion).) Writing for himself and Justice Blackmun, however, Justice Powell rejected the plurality's proposition that "no matter what the circumstances, neither due process principles nor [the Court's] supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition." (425 U.S. at 495 (Powell, J., concurring in the result).) Justice Brennan's dissent, joined by Justices Stewart and Marshall, appeared to endorse the due process limitation. (425 U.S. at 497 (Brennan, J., dissenting).) The upshot of *Hampton,* then, is that only two sitting Justices have endorsed the due process constraint on police conduct, while two others have declared the question open. Two sitting members of the Court, Justices Stevens and O'Connor, have not yet had an opportunity to address the issue.

In any event, it is clear that any due process limitation will be extremely narrow. Justice Powell's concurring opinion in *Hampton,* for example, noted that cases involving the principle would be "rare," and observed that "police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." (425 U.S. at 495 n. 7.) Similarly, the *Russell* majority gave some hint as to the contours of a due process defense by citing *Rochin* v. *California,* where the Court invalidated a conviction that had been obtained after police had secured evidence by forcibly pumping the stomach of a suspect. While a detailed assessment of the significance of the due process defense will have to await future developments in the Supreme Court, it is evident that due process principles will not take the form of an objective entrapment defense and will not apply to the vast majority of cases in which entrapment presently is pleaded.

B. Proposals for Reform

As the preceding discussion should make clear, the Select Committee has concluded that the existing judicially enforceable constraints on police undercover activity are unsatisfactory. The entrapment doctrine in its present form is constructed around no coherent principle; it serves, at best, as a mislabeled invitation to jury nullification when the defendant is especially sympathetic or the police tactics particularly overbearing. The uncertain future and narrow application of the due process doctrine, meanwhile, make it an inadequate substitute for a meaningful entrapment defense.

In this context, three possibilities for reform immediately commend themselves: simple elimination of the entrapment defense; statutory codification and elaboration of the due process principles recently articulated by the courts; or a modification of the definition of entrapment. The Select Committee concludes that the first of these suggestions is inadvisable and that the second is unnecessary at this point. For reasons explained below, however, the Select Committee finds that the third proposal is both sensible and long overdue.

1. Elimination of the entrapment defense

While the possibility of eliminating the entrapment defense has received little attention (*but cf.* Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application,* 1 U.S.F. L. Rev. 263 (1967)), a good case can be made in favor of such a course.[17] If society actually believes that those tempted into criminality are not culpable (a notion that the Select Committee rejects), the substantive criminal law should be modified to reflect that fact and to acquit persons tempted into crime, whether by governmental or by non-governmental actors. If, on the other hand, efficiency considerations lie at the heart of the entrapment doctrine, it would be consistent with the broad discretion awarded police and prosecutors in other areas to allow law enforcement officials to choose for themselves the techniques that are most cost-effective in combating crime. (*See* Seidman, *supra* p. 366, at 143.) Insofar as there is concern that the targets of undercover investigations will be chosen for improper reasons, existing doctrines of equal protection and selective prosecution are available.

While these are provocative arguments, the Select Committee nevertheless believes that an entrapment defense serves a powerful and necessary—even if largely symbolic—function. It reflects the deeply rooted and often unarticulated feeling that "[h]uman nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime." (*Sherman* v. *United States,* 356 U.S. at 384 (Frankfurter, J., concurring in the result).) An entrapment defense also gives force to the general perception that it is inappropriate for the government to "play on the weaknesses of an innocent party and beguile him into committing crimes which he otherwise would not have attempted." (*Sherman* v. *United States,* 356 U.S. at 376.) While we expect government to declare and enforce rules of conduct, we do not expect it to test the moral fiber of the random individual.

Above all else, it is dangerous to give law enforcement officials limitless powers to tempt citizens into criminality and then to punish those citizens for their criminal conduct. It presumably is for this reason that, even absent any explicit Congressional comment, the courts "have continued gropingly to express the feeling of outrage at conduct of law enforcers that brought recognition of the [entrapment] defense in the first instance." (*Sherman* v. *United States,* 356 U.S. at 378 (Frankfurter, J., concurring in the result).) The power to induce criminality is too intrusive to escape regulation, and the Select Committee therefore concludes that the entrapment doctrine should not be eliminated.

---

[17] Indeed, the English legal system never has squarely recognized an entrapment defense. *See* Barlow, *Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment,* 41 Mod. L. Rev. 266 (1978).

2. Codification of due process principles

One way to forestall the most serious potential abuse of the government's "inducement power" is to codify the due process principles discussed by Justice Powell in *Hampton.* There undoubtedly is a societal consensus that a variety of police practices are unacceptable in most circumstances. Most people would agree, for example, that law enforcement agents should not use threats of harm to any individual's person or property—whether that of the target, of his family, or even of a stranger—to induce targets to commit criminal acts; that police should not manipulate a target's personal or vocational situation—for example, by destroying his property so as to increase his need for money—to increase the likelihood of his engaging in criminal conduct; that police should not entice people into the commission of crimes that could not have been committed without government involvement; that undercover agents should not cultivate intimate relationships with targets, the better to lure them into criminality; and that law enforcement agents should not engage in serious and harmful criminal activity, or intentionally injure innocent third parties, in an attempt to deter crime. (*See generally United States* v. *Archer,* 486 F.2d 670, 676-77 (2d Cir. 1973).) There is little doubt that the costs of such tactics—both to the target and to society—are likely to outweigh by a substantial amount the benefits gained through deterrence of crime. (*Cf. Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).)

Given the uncertain status of the due process defense in the Supreme Court, then, it can be argued that Congress should by statute make clear the power of the federal courts to void convictions obtained through use of "outrageous" police practices. Such an approach would demonstrate the unacceptability of overbearing methods of law enforcement, regardless of the outcome of the constitutional litigation currently ongoing in the courts. It also would more candidly reflect the case-by-case jury nullification function now served by the entrapment defense.

On balance, however, the Select Committee believes that legislation of this sort is not yet needed. While the Select Committee's investigation and the reported court decisions addressing due process issues have revealed instances of poor judgment and occasional overzealousness on the part of federal law enforcement officials, there is little evidence that federal agents engage in overbearing practices with sufficient frequency to justify such broad legislation in this area.

Further, a general outrageousness standard would provide law enforcement officials and the judiciary with little useful guidance. Unacceptably intrusive undercover tactics cannot all be identified through the use of a simple formula; the courts that have struggled with due process claims have emphasized that any assessment of an operation's propriety must look to the totality of the circumstances, including the law enforcement tactics used, the investigative background, and the target's situation. (*See United States* v. *Tobias,* 662 F.2d 381, 387 (5th Cir. 1981); *United States* v. *Brown,* 635 F.2d 1207, 1212–13 (6th Cir. 1980).) For the present, the Select Committee is content to leave the general problem of overbearing police conduct in the hands of the courts, with the expectation that they will void convictions obtained through methods that truly shock the public conscience.

3. An objective entrapment standard

In the Select Committee's view, then, some form of judicially enforceable entrapment defense should be preserved, but it should not be aimed broadly and generally at undefined offensive practices. On balance, the Select Committee concludes that the even-handed administration of justice can best be served by redrawing the entrapment doctrine along objective lines to serve limited and clearly defined purposes, while leaving ample room for the use of innovative and effective law enforcement techniques. Devising a formula to achieve these ends, however, is no simple task.

Unfortunately, the minority Supreme Court opinions advocating an objective entrapment standard provide little help. Those opinions devote far more space to criticizing the majority approach than to formulating a coherent alternative. As a result, they are surprisingly vague when articulating a standard for, or even when stating the purposes to be served by, an entrapment defense. Justice Stewart, for example, proposed that entrapment be found "when the agents' involvement in criminal activity goes beyond the mere offering of . . . an opportunity [to commit an offense], and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready or willing to commit it. . . ." (*United States* v. *Russell,* 411 U.S. at 445 (Stewart, J., dissenting).) Similarly, Justice Frankfurter opined that his formula did "not mean that the police may not act so as to detect those . . . ready and willing to commit further crimes. . . . It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only those persons and not others." (*Sherman* v. *United States,* 356 U.S. at 383–84 (Frankfurter, J., concurring in the result).) While the substance of these formulations is less than entirely clear, it appears to rule out most "proactive" police behavior, for fear of leading into criminality individuals who never would have violated the law but for the government inducement. (*See id.* at 383.)

The Select Committee finds this approach too restrictive of legitimate law enforcement operations. Taken literally—that is, forbidding the police from going beyond "the mere offering of . . . an opportunity" to commit crime—the Frankfurter-Stewart standard fails to take into account the fact that an undercover technique may appear impermissibly intrusive in one context and not in another: repeated solicitation and the offer of premium prices may seem an improper way of luring a novice into the narcotics trade, for example, but such tactics appear more reasonable when the police are attempting to catch a cautious professional drug dealer. (*See* Park, *supra* p. 364 note 9, at 253.) Similarly, a line drawn between the passive "offering of an opportunity" to commit crime and the more active "solicitation" of illegal activity would eliminate some important and desirable law enforcement techniques. When police suspect, but cannot otherwise prove, that consensual crimes are taking place, for example, solicitation may be an entirely reasonable method of investigation.

The superficially attractive phrases that regularly appear in the Court's opinions have little real content; if applied rigorously, tests employing those phrases would impair universally accepted methods of law enforcement. Thus, virtually every entrapment opinion, majority or minority, produced by the Court has declared that an entrapment defense must prevent the conviction of those who, "left to themselves, might well have obeyed the law." (*Sherman* v. *United States,* 356 U.S. at 384 (Frankfurter, J., concurring in the result).) But it will be impossible in any case to tell whether the defendant would have engaged in criminality absent government involvement; if the law enforcement operation replicates the real world and the defendant takes the proffered bait, it may be likely—but never can be certain—that the defendant ultimately would have been led into criminality by private actors.[18] It is difficult to believe, however, that either the majority or the minority Justices would acquit all such individuals. This point is well illustrated by the "decoy" operations commonly used by local police, in which undercover agents are disguised as vulnerable potential crime victims: few jurists would suggest that an individual who attacks a police decoy should be acquitted on entrapment grounds, even if the defendant persuasively claims that he never would have engaged in criminality had it not been for the decoy's presence.[19]

The minority Justices' proposed tests similarly are flawed to the extent that they would use the entrapment doctrine to bar the government from "instigating" crime, or from being the "but for" cause of criminal acts. Whenever law enforcement agents offer an inducement or provide an opportunity for the commission of a criminal offense, they become a "but for" cause of the resulting crime, and to that extent they instigate an offense that otherwise would not have occurred. This is true, for example, in the decoy situation outlined above.

Designing an entrapment defense, then, requires a candid recognition that the entrapment doctrine has very little to do with culpability, and very much to do with directing law enforcement efforts into effective and socially desirable channels. Thus, while police should not, as a general matter, attempt to lure into criminality individuals who previously have shown no inclination to engage in criminal conduct, entrapment is not the most effective means of preventing such police activities. To the contrary, that goal can best be achieved by imposing direct restraints on the use of undercover operations—for example, by requiring an articulable suspicion that an individual is involved in criminality before offering him an inducement. (*See* pp. 377–89 *infra.*) A manageable entrapment defense should serve two comparatively limited purposes: It should discourage the criminal justice system from punishing governmentally induced lawbreakers, when doing so will fail significantly to advance legitimate law enforcement purposes, and it should prevent overzealous or improperly motivated officials from abusing their power to create criminals.

---

[18] Certainly, this does not put the entrapped defendant in a position morally superior to that of the individual led into criminality by a private actor; absent coercion by the government, the entrapped defendant, like his non-entrapped counterpart, freely chose to engage in a criminal act.

[19] As Professor Seidman acknowledges, an equivalent inducement,

> might never be offered [by a non-governmental actor]. But all predictions of dangerousness are contingent and uncertain. The case of an entrapped defendant, moreover, is crucially different from that of a person incarcerated for an inchoate crime or a presumed disposition to commit crimes. In the latter situations, the defendant has not yet performed a criminal act, and we therefore must speculate whether, if left alone, he will ever violate the law. But the entrapped defendant *has* violated the law. He has performed an act that the law condemns, and incapacitating him for reasons of dangerousness is no different in principle from incapacitating any other criminal on this basis.

Seidman, *supra* p. 366, at 141.

One possible objective standard that has received some attention and that would further the principles outlined above is a test that would bar use of inducements substantially larger than those likely to occur in the real world. (*See* Seidman, *supra* p. 366, at 121, 143.) As has been noted, it certainly seems desirable as a matter of policy for the police to design undercover operations that mirror reality; as a general matter, offering an unrealistically large inducement does little more than test the moral fiber of the target.

An entrapment test based on this criterion, however, is apt to be unsatisfactory for three reasons. First, it often will be impossible for the prosecution to establish to any degree of certainty that the proffered inducement replicates those occurring absent government involvement. Second, requiring the police to prove that the inducement mirrors the real world may force them to reveal sensitive law enforcement data or the identities of confidential sources. Finally, there may be situations in which the offer of an unrealistically generous inducement might be appropriate. For example, when authorities believe, but are otherwise unable to prove in court, that a narcotics dealer is selling his goods to third parties, the offer of a premium price to divert the drugs into government hands may not be unreasonable.

The Select Committee therefore recommends another version of the objective standard, one similar to that developed more than ten years ago by the National Commission: A defendant should be acquitted on entrapment grounds when a law enforcement agent—or a private party acting under the direction or with the approval of law enforcement authorities—induces the defendant to commit an offense, using methods that would be likely under similar circumstances to cause a normally law-abiding citizen to commit a similar offense. As the National Commission added, however, the mere offer of an opportunity to commit a crime should not in itself constitute entrapment. (*See* National Commission, A Proposed New Federal Criminal Code § 702(2), at 58 (1971).)

This definition serves the principal purposes that have been articulated in support of an entrapment defense. It circumscribes the government's power to create criminals, making it impossible for law enforcement agents to lure normally law-abiding individuals into criminality through the use of extraordinarily large, literally irresistible inducements.[20] At the same time, it forestalls the practical risk that, once into an investigation, agents will feel overwhelming pressure to use overbearing tactics in pursuit of a conviction. It thus serves to prevent the use of some of the most offensive of the police tactics mentioned above.[21]

---

[20] We do not mean the word "inducement" to signify only offers of gain; a threat or other form of coercion may also induce a defendant to commit a criminal act.

A standard pegged to the "normally law-abiding individual" also would serve efficiency concerns by discouraging ineffective law enforcement activities. While undercover operations generally can be expected to have a substantial deterrent effect on crime, the conviction of an individual who responded to an "irresistible" inducement is unlikely to deter persons who find themselves facing similar offers in the future. Conversely, if the inducement is sufficiently large that it would lead substantial numbers of people into criminality, the fact that a defendant responded to that inducement reveals very little about whether he is the sort of dangerous individual who should be subjected to specific deterrence.

Equally as important, the proposed formula preserves wide latitude for law enforcement operations. As is demonstrated by the narrowness of the existing excuse and justification defenses, individuals are expected to obey the law in virtually all circumstances: poverty, drug addiction, immediate financial reverses, and the like are not considered sufficent cause for a defendant to violate the law. This is not to say that a law-abiding individual is empirically likely to commit an offense only when the technical requirements of duress or its sister defenses have been met. But the narrowness of those defenses—along with the fact that the vast majority of the citizenry is expected to, and does, resist the temptation to commit illegal acts—suggests that only extraordinary pressures are likely to lead normally law-abiding individuals into criminality. Certainly, "[t]he man on the Clapham omnibus would not sell heroin even if he were offered inducements that would be quite tempting to a member of the drug culture." (Park, *supra* p. 364 note 9, at 173.) In this context, the "normally law-abiding individual" standard may be "viewed as a warning that inducements will not be condemned merely because they require the target to exercise a substantial amount of self-control." (*Id.* at 174.) Thus the focus of the entrapment inquiry is pointedly placed on the law-abiding individual, rather than on the "chronic" or professional criminal. (*See* 1 National Commission Working Papers 321.) In any event, it is worth noting that at least six states have adopted objective entrapment tests modeled on the American Law Institute or National Commission proposals (*see* Park, *supra* p. 364 note 9, at 168–69, and notes 15–16), without suffering catastrophic effects on their criminal justice systems.

If the federal entrapment standard is modified along the lines discussed above, a variety of procedural issues will have to be resolved.[22] The Select Committee concludes that it would be appro-

---

[21] It is worth noting, however, that many offensive police tactics will will not activate an entrapment defense such as that outlined in text. Our proposed standard, for example, obviously will not prevent law enforcement agents from engaging in serious criminal acts during the course of an undercover operation, unless those acts exert pressure upon the target to commit a crime. (*Cf. United States* v. *Archer*, 486 F.2d at 676–77.)

[22] These include questions relating both to the burden of proof when entrapment is pleaded and to the propriety of raising inconsistent claims when the defendant wishes both to deny guilt and to plead entrapment. On these issues, we endorse the conclusion of the National Commis-

Continued

priate for these to be addressed by the Committee on the Judiciary. The Select Committee notes, however, its agreement with the National Commission and with those commentators who would have the entrapment issue presented to a judge, rather than to a jury. (*See* 1 National Commission Working Papers 325 and note 135.) The "normally law-abiding individual" standard does not require the resolution of any factual issues, and it does not, of course, purport to hinge on the innocence of the accused, two areas that typically are the province of the jury. Indeed, because it is intended to mold police behavior, having the standard applied by judges who can articulate its requirements in a consistent manner might be especially helpful.

4. *Entrapment per se*

The entrapment doctrine we have proposed is a limited one, with a particular meaning: it provides a defense to defendants who truly are "trapped" by law enforcement techniques that, if used against other citizens, would be likely to ensnare many of them. So defined, entrapment obviously does not bar the use of all law enforcement tactics that much of the population would find offensive. (*See* note 21 *supra.)*

A few undercover practices, however, seem to be so overbearing as to be unacceptable in virtually every situation and are related to entrapment in that they are relatively likely either to ensnare harmless individuals or to impose on otherwise law-abiding persons coercive pressure to commit crimes. Three such offensive practices, alluded to above (*see* pp. 370–71) *supra*), are: (1) the use of threats by police to induce targets to commit criminal acts; (2) the manipulation by police of a target's personal or vocational situation to increase the likelihood of the target's engaging in criminal conduct; and (3) the enticement of persons into the commission of crimes that could not have been committed without government participation. It is the Select Committee's view that these three techniques are extraordinarily harmful to the individual, are fundamentally inconsistent with the basic values of our society, and are unnecessary for effective law enforcement. The Select Committee therefore recommends that defendants induced to commit crimes through the use of such tactics be acquitted on entrapment grounds per se.

As a general matter, the circumstances surrounding convictions obtained through threats, manipulation, or the facilitation of otherwise impossible criminal acts are apt to be similar to those characterizing the usual entrapment situation. Operations involving any of these three tactics are far more likely than are conventional undercover investigations to ensnare individuals who never would

---

sion. Since the defendant seeks to avoid the consequences of having committed a criminal act by pleading entrapment, it seems reasonable to require the defense to establish entrapment by a preponderance of the evidence. (*See* 1 National Commission Working Papers 324.) On the second issue, current practice, with some exceptions, bars the defendant from pleading entrapment if he has denied the ocurrrence of the underlying criminal transaction. (*See, e.g., United States* v. *Rodriques,* 433 F.2d 760, 761–62 (1st Cir.), *cert. denied,* 401 U.S. 943 (1971); *United States* v. *Pickle,* 424 F.2d 528, 529–30 (5th Cir. (1970).) This practice cannot be reconciled with the generally permissive attitude taken towards inconsistent defenses in most other contexts, and we believe that it would be wise to eliminate the pleading limitation in the entrapment area as well. (*See* 1 National Commission Working Papers 325–26.)

have committed criminal acts absent government involvement, for none of these tactics is likely to be replicated in the real world. While there obviously are exceptions,[23] there is little doubt that most people who engage in criminality do so willingly, rather than in response to coercive actions by third parties; and, if the crime could not have been committed without the government's participation, there was by definition no danger that the defendant, no matter what his criminal intentions, was going to commit such a crime. Meanwhile, so far as the first two techniques are concerned, the use of the government's resources to threaten or to manipulate a defendant is apt to put even the most law-abiding individual at a serious disadvantage.

Hence each of the tactics mentioned above shares several of the most important characteristics of the classic entrapment situation. Each poses an inordinate risk of involving in criminality defendants who pose little threat to engage in such criminality. Each provides the overzealous law enforcement agent with an unnecessarily powerful tool that can be used to create criminals. And, even if there is some chance that the offensive technique will be replicated by a nongovernmental actor, so that its use in an undercover operation might serve a legitimate deterrent purpose, police adoption of the methods outlined above seems inappropriate, for want of a better formula, as truly "shocking to the universal sense of justice."

This conclusion derives from the Select Committee's view that the function of government is substantially perverted when executive power is used to coerce individuals into criminality or to facilitate the commission of crimes by those who could not or clearly would not otherwise have violated the law. At the same time, the perception that convictions were obtained through the use of overbearing or fundamentally unfair methods inevitably will have a pernicious effect on public faith in the system of criminal justice. While there is a consensus that the government should attempt to solve and deter acts of criminality, it also is the general view that the individual should be able to avoid punishment unless he truly chooses to violate the law. Thus, the duress defense and related judicial doctrines demonstrate our reluctance to convict those who commit crimes unwillingly—a circumstance that makes the government's role in placing the individual in such a morally ambiguous situation particularly offensive. The Select Committee would forestall these dangers by making use of the tactics mentioned above an affirmative defense to charges stemming from their application.

Again, as with the general entrapment defense discussed in the preceding section, the Select Committee would place the burden of persuasion here on the defense. To obtain an acquittal on entrapment grounds the defendant must, by definition, have committed a criminal act, and there are substantial costs associated with releasing such individuals. The Select Committee therefore recommends that entrapment per se be established when the defendant demonstrates by a preponderance of the evidence that he was induced to commit the charged offense by one of the overbearing tactics discussed above.

---

[23] The most obvious exception is the individual who offers a bribe to a public official in response to a threat of adverse official action. It is worth noting, however, that even in this situation courts have been reluctant to convict such individuals of bribery; jurists have suggested that the victim of extortion cannot have the specific intent necessary for completion of the bribery offense. (*See, e.g., United States* v. *George*, 477 F.2d 508, 514–15 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); *United States* v. *Barash*, 365 F.2d 395, 401–02 (2d Cir. 1966).)

III. A RECOMMENDATION FOR LEGISLATION ESTABLISHING THRESHOLD REQUIREMENTS FOR THE INITIATION OF AN UNDERCOVER OPERATION

The Congress, through its appropriate committees, should consider legislation providing that:

1. no component of the Department of Justice may initiate, maintain, expand, extend, or renew an undercover operation except,

(a) when the operation is intended to obtain information about an identified individual, or to result in the offer to an identified individual of an opportunity to engage in a criminal act, upon a finding that there is reasonable suspicion, based upon articulable facts, that the individual has engaged, is engaging, or is likely to engage in criminal activity;

(b) when the operation is intended to obtain information about particular specified types of criminal acts, or generally to offer unspecified persons an opportunity or inducement to engage in criminal acts, upon a finding that there is reasonable suspicion, based on articulable facts, that the operation will detect past, ongoing, or planned criminal activity of that specified type; provided that if, during the course of the operation, agents of the Department of Justice wish to offer to a specific individual—who is identified in advance of the offer—an inducement to engage in a criminal act, they may do so only upon a finding that there is a reasonable suspicion, based upon articulable facts, that the targeted individual has engaged, is engaging, or is likely to engage in criminal activity;

(c) when a government agent, informant, or cooperating individual will infiltrate any political, governmental, religious, or news media organization or entity, upon a finding that there is probable cause to believe that the operation is necessary to detect or to prevent specific acts of criminality;

(d) when a government agent, informant, or cooperating individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will enter into a confidential relationship with that person, upon a finding that there is probable cause to believe that the operation is necessary to detect or to prevent specific acts of criminality;

2. when certain specified sensitive circumstances (including those currently listed in Paragraph B of the Attorney General's Guidelines on FBI Undercover Operations) are present or are reasonably expected to materialize during the course of the undercover operation, the finding of reasonable suspicion required by subsection (1) (a) or (b) above shall be made by the Undercover Operations Review Committee following procedures to be specified in guidelines. When there is no expectation that the *operation will involve such sensitive circumstances, that determination shall be made by the Special Agent in Charge or by the equivalent official in the field following procedures to be specified in guidelines. Findings of probable cause, as required by subsection (1) (c) or (d) above, shall be made by the Undercover Operations Review Committee, following procedures to be specified in guidelines;*

3. when the initiation, expansion, extension, or renewal of an undercover operation is necessary to protect life or to prevent other serious harm, and when exigent circumstances make it impossible, before the harm is likely to occur, to obtain the authorization that would otherwise be required, the Special Agent in Charge or the equivalent official in the field may approve the operation upon his finding that the applicable requirements of subsection (1) have been met. A written application for approval must then be forwarded to the Undercover Operations Review Committee at the earliest possible opportunity, and in any event within 48 hours of the initiation, expansion, extension or renewal of the operation. If the subsequent written application for approval is denied, a full report of all activity undertaken during the course of the operation must be submitted to the Director and to the Attorney General;

4. a failure to comply with the provisions of this statute shall not provide a defense in any criminal prosecution or create any civil claim for relief.

As shown above, the Select Committee has concluded that the enactment of coherent, practical, and effective legislation establishing a statutory entrapment doctrine is essential to maintain public faith in the system of criminal justice, to restrain overzealous law enforcement conduct, to provide intelligible guidance to law enforcement officers, and to safeguard civil liberties of citizens. For several reasons, however, even an effective entrapment defense does not, standing alone, adequately promote those goals.

First, neither the objective entrapment test advocated by the Select Committee nor the judicially created predisposition standard now in force will in practice forestall any but the most intrusive undercover operations involving the most overbearing tactics. Thus, for example, neither formulation of the entrapment doctrine will prevent the conviction of particular individuals who can prove that they were unlikely to have engaged in criminality absent governmental involvement; and, accordingly, the entrapment doctrine will not forestall police operations aimed at convicting such citizens of crimes. As the preceding section of this report suggests, however, the conviction of such generally law-abiding citizens imposes severe and unnecessary costs on the defendants and fails to serve any significant law enforcement purpose (*See* pp. 362–77 *supra.*)

Entrapment principles also do not prevent or remedy the unnecessary violations of privacy that attend undercover operations aimed at innocent individuals who are not suspected of, and who do not ultimately engage in, wrongdoing. Further, even where it applies, the entrapment defense, like all exclusionary remedies, is inefficient: It does not establish that a given undercover investigation was conducted improperly until after law enforcement resources have been expended for the operation and for the resulting prosecutions.[24]

Therefore, the Select Committee recommends that Congress impose direct limits on the use of the undercover technique and circumscribe the situations in which inducements to engage in criminality may be offered. The contours of these limitations should, in the manner described below, be defined by the need for effective law enforcement and by the harms likely to be caused by unrestrained undercover activity.

A. Existing Law

While the Supreme Court has required law enforcement agents to demonstrate probable cause and to obtain a warrant before searching property or engaging in wiretapping and other nonconsensual electronic monitoring, it has not imposed a corresponding constitutionally based limitation on the use of informants or undercover operations. To the contrary, the Court has held that no constitutional problem is raised when a defendant acts "upon misplaced confidence" that an undercover informant would not reveal the defendant's wrongdoing. (*Hoffa* v. *United States,* 385 U.S. at 302.) As the majority noted in *Hoffa,* "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." (*Id.; see United States* v. *White,* 401 U.S. at 751.)

Even the Justices advocating the strictest constitutional restrictions on official searches and seizures have conceded that "[t]he risk of being . . . betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." (*United States* v. *Lopez,* 373 U.S. 427, 465 (1963) (Brennan, J., dissenting).) Similarly, no Justice has suggested that a warrant must be obtained before police may offer an individual inducements to engage in criminal acts. (*Cf. Hampton* v. *United States,* 425 U.S. 484 (1976); *United States* v. *Russell,* 411 U.S. 423 (1973).)

A greater controversy has been sparked by the suggestion that a warrant requirement should be imposed on undercover agents who seek to engage in consensual electronic monitoring.[25] Even on this issue, however, a majority of the Court has maintained that one cannot "liken [electronic] eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure." (*United States* v. *On Lee,* 343 U.S. 747, 754 (1952).) Such warrantless consensual recording and monitoring has been upheld by analogy to those cases finding the use of informants to be outside the Fourth Amendment: "We think the risk that [the defendant] took in offering a bribe to [a law enforcement agent] fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."

---

[24] The entrapment plea is also notoriously ineffective. Even a defendant who is acquitted on entrapment grounds is likely to suffer a permanently damaged reputation. (*See* pp. 363–67 *supra.*)

[25] By "consensual electronic monitoring" the Select Committee means the taping or transmission of a conversation with the acquiescence of one, but not all, of the parties.

(*United States* v. *Lopez,* 373 U.S. at 439.) This conclusion was reaffirmed more recently in *United States* v. *White,* 401 U.S. at 751–53, and *United States* v. *Caceres,* 440 U.S. 741, 750–51 (1979).[26] In effect, the Court has thus concluded that the person subjected to consensual monitoring, unlike the subject of a wiretap or "bug" (*see Katz* v. *United States,* 389 U.S. 347 (1967)), has no constitutionally protected "expectation of privacy" in his overheard conversations.

While the Court has discovered no constitutional or statutory constraint on the initiation of undercover operations or on the offer of criminal inducements, some limitations are imposed by Department of Justice guidelines. The Criminal Investigations Guidelines provide that no investigative operation may be initiated unless "facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed" (Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations I, ¶ C(1) (Dec. 1980)); and no undercover domestic security investigation may be initiated unless there is a factual predicate for a belief that the investigation will reveal evidence of criminality (*see* Attorney General's Guidelines on FBI Undercover Operations, General Authority (2) (Jan. 1981)). Similarly, the FBI Undercover Operations Guidelines require, as a general matter, that FBI undercover operations "involving an invitation to engage in illegal activity" not be initiated unless, among other things, "the approving authority [is] satisfied that . . . [t]here is a reasonable indication that the undercover operation will reveal illegal activities." (Id., ¶ J(2)(b).)

There are, however, important gaps in the coverage of the guidelines. Section I, paragraph D(1) of the Criminal Investigations Guidelines permits undefined "inquiries" to be initiated on the basis of "information or an allegation not warranting full investigation." Paragraph K of the FBI Undercover Operations Guidelines provides that undefined "routine investigative interviews" and undefined "so-called 'pretext' interviews" may be conducted without the approval of FBI HQ or of a Special Agent in Charge. Equally as important, paragraph J(3) of the FBI Undercover Operations Guidelines expressly contemplates that the Director, and under certain circumstances the Undercover Operations Review Committee, may approve the offer of criminal inducements to an individual "even though there is no reasonable indication that that particular individual has engaged, or is engaging, in the illegal activity." Finally, the guidelines governing DEA undercover operations are substantially weaker than those governing FBI operations, and the INS has no guidelines at all.

B. The Intrusiveness of Undercover Operations

Department of Justice officials have defended the existing law governing undercover investigations by arguing that undercover techniques are not as intrusive as other law enforcement and judicial techniques, such as searches, compelled grand jury testimony, and subpoenas for documents. (*See, e.g.,* FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. 141–42 (1980) (statement of Philip B. Heymann).) They also noted that the target of an undercover operation makes his incriminating disclosures voluntarily and that someone who wants to avoid the risk that he is revealing his thoughts to a government agent can simply stop speaking to his associates. (*See id.*) Similarly, they suggest that there is little danger of a criminal inducement's being offered to a law-abiding citizen, because undercover operations generally are structured to make clear the illegal nature of the transaction. (*See, e.g., id.* at 139–40.) In the Select Committee's view, however, these contentions are seriously flawed, and undercover techniques are highly intrusive, important though they are to effective law enforcement.

---

[26] The Court concluded in those cases that the vitality of its earlier decisions had not been affected by its 1967 holding in *Katz* v. *United States,* 389 U.S. 347 (1967), that electronic surveillance implicates the Fourth Amendment.

The contention that the use of informants does not affect the same privacy interests as do physical searches and wiretaps cannot withstand scrutiny. Advocates of that position have argued that, because a disgruntled friend or colleague can always disclose an individual's words or acts to law enforcement authorities after the fact, informants and government undercover agents, too, should be permitted to disclose such words or acts after winning the individual's confidence. That argument assumes that precisely the same factors are at work when a private party informs on a citizen as are involved when a government undercover agent extracts the incriminating information himself. But a parallel argument can be made as to searches or wiretaps: If a third party searches a defendant's home or taps a defendant's telephone and provides any information thus obtained to the government, the government is free to use it in a subsequent prosecution. It never has been suggested, however, that the government may for that reason itself tap an individual's telephone or search his residence without first obtaining a warrant on a showing of probable cause that a crime has been, is being, or is about to be committed. Similarly, the risk that an individual's confidence might subsequently be betrayed by a disloyal associate is greatly magnified when it is made to include the additional risk that the listener to whom the individual reveals his confidence is a disguised government agent whose prearranged mission is to elicit incriminating information. (*See* FBI Undercover Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 4 (1981) (statement of Geoffrey R. Stone); *cf. United States* v. *Lopez,* 373 U.S. at 449 (Brennan, J., dissenting).)

Accordingly, it is beyond reasonable dispute that undercover operations can and often do invade legitimate privacy interests in significant ways. Aside from sting and decoy operations, undercover investigations generally progress by having an agent or an informer first win the confidence of the target and then obtain incriminating information. In the course of that mission, the undercover technique is likely to be fully as intrusive as a conventional wiretap. As the Abscam tapes reveal, for example, undercover agents almost invariably will learn significant amounts of information about the personal lives and political views of targets, including targets who ultimately are revealed to be innocent.[27] This danger is compounded by the fact that virtually everything the target says and does will be captured by cameras and tape recorders and will be subject to the risk of being leaked. More generally, as Justice Harlan noted in a somewhat different context, the widespread, unregulated use of informants and undercover agents inevitably will inhibit public discourse by "undermin[ing] that confidence and sense of security in dealing with one another that is the characteristic of individual relationships between citizens in a free society." (*United States* v. *White,* 401 U.S. at 787 (Harlan, J., dissenting).)

Undercover operations that include offers of inducements to commit crimes are intrusive in other ways, as well. While the practice of making clear the illegal nature of such inducements is an important safeguard,[28] the FBI Undercover Operations Guidelines nevertheless clearly permit undercover operatives to offer unrealistically large inducements and to tempt individuals who otherwise would be unlikely ever to become involved in criminality. As is elsewhere noted, convictions obtained by such practices serve almost no sound law enforcement purpose. Moreover, as events in Abscam dramatically demonstrate, the mere offer of a criminal temptation, even to a citizen who refuses it, can, when memorialized by hidden cameras and microphones, be very intrusive and harmful.

C. The Select Committee Proposal for Reform

Many of the cases that have arisen under the Fourth Amendment to the Constitution demonstrate that even the most well-intentioned officials occasionally will be overzealous in the pursuit of crime and will engage in unjustified investigative activities. The Constitution protects against the most egregious of those activities, but it lies with Congress to attempt to establish the optimal balance between the protection of privacy interests and the preservation of effective law enforcement techniques. The Select Committee suggests that its recommendations establishing threshold requirements for the initiation of undercover operations and for the offer of inducements to engage in criminal acts will move us much closer to that optimum.

The approach proposed by the Select Committee closely follows that used by the Supreme Court and by the existing FBI Undercover Operations Guidelines in their attempts to reconcile competing privacy and law enforcement interests: Thus, the Select Committee's proposal first requires that, before initiating an undercover operation, a federal law enforcement agency must make a threshold determination that there is a factual basis for believing that the investigation will reveal evidence of specific criminality. This approach has several salutary effects. It gives citizens some assurance that they are not being arbitrarily or for improper reasons subjected to misleading and intrusive governmental action. It requires a reasoned determination by the government, *before* the intrusion takes place, that scrutiny of particular citizens is necessary. It strikes an historically justified balance between the individual citizen's interest in being left alone and society's need for effective law enforcement.

---

[27] It is true that an undercover agent can attempt, within limits, to keep conversations involving targets focused on the suspected illegality that is the subject of the investigation. But, as the Abscam transcripts reveal, it obviously is unrealistic to expect agents or informants to refuse to engage targets in any "non-business related" discussions.

[28] It is worth noting, however, that this requirement is found in only the FBI Undercover Operations Guidelines. No corresponding limitation, for example, appears in the current DEA Guidelines.

The specifics of the Select Committee's proposals are designed to further these principles by closing some of the gaps in the existing guidelines, while allowing for the creation of a flexible and manageable procedural framework. Thus, before a specific, previously targeted individual or group of individuals is subjected to an undercover investigation, Paragraph 1(a) of the proposal requires a finding, based upon articulable facts, of a reasonable suspicion [29] that the targeted individual or group has engaged, is engaging, or is likely to engage in criminal activity.

This standard would apply to all undercover operations and to all uses of the undercover technique, including "preliminary inquiries" and "pretextual interviews," however those undefined terms have been or may be applied by components of the Department of Justice. In the Select Committee's view, neither a particular use of the undercover technique nor the stage at which it is used in an investigation significantly affects the degree to which it intrudes upon privacy interests, the resentment likely to be felt by citizens who discover that they have been misled by federal agents, or the risks of abuse that are peculiar to the undercover technique.

Moreover, a reasonable suspicion should be required not only when an operation is initiated, but also when federal authorities seek to renew a previously authorized operation, to use undercover techniques against a new target, or to expand the scope of the operation beyond the geographic or subject-matter boundaries that initially were approved. The proposal establishes such a requirement by use of the words "expand," "extend," and "renew" [30] in the introduction to the proposal's section "1." If the reasonable suspicion requirement were not to apply to such expansions and extensions, the law enforcement agency could readily circumvent all of the threshold requirements for a new operation simply by expanding and extending without limitation any of its existing operations. This, essentially, is a license that the FBI has under the existing guidelines.

Similarly, whenever the authority that approved the operation—in the FBI, either the Undercover Operations Review Committee or a Special Agent in Charge—determines that there no longer is reason to believe that the target was, is, or will be engaging in criminality or concludes that the original "reasonable suspicion" was not well-founded and that no additional incriminating information has come to light since the initiation of the investigation, that authority should terminate the operation.[31] That obligation is imposed in the proposal by use of the word "maintain" in the introductory clause to section "1."

---

[29] This standard, which is familiar to law enforcement officials from Fourth Amendment law (*see, e.g.*, FBI Statutory Charter: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 157 (1978) (testimony of Griffin B. Bell)), requires a specific factual basis for the belief that criminality will be found. The reasonable suspicion test apparently is the standard currently required by the Criminal Investigations Guidelines for criminal investigations, but not for "inquiries." (*See* Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations I, ¶ C(1) (Dec. 1980).)

This standard cannot be met by assertions such as, "Everyone knows that politicians are corrupt," or even by the arguably accurate assertion that some number of individuals in every discrete group are likely to be lawbreakers. Those assertions are not specific facts relating to the particular situations under investigation.

[30] These terms are included in order to make clear that the proposed requirement is meant to reach the expansion of operations into new investigative areas, the temporal extension of operations, and the outright renewal of investigations.

Proposal 1(b) imposes parallel requirements on the initiation and modification of operations that are not aimed at previously identified individuals or that, like sting and decoy investigations, are intended to offer to the public at large an opportunity to engage in criminality. This recommendation is intended to place limitations on the use of scattershot operations that may obtain a vast amount of information about substantial numbers of people. Again, the proposed legislation would require, before the use of intrusive techniques is authorized, a reasonable suspicion that evidence concerning a particular type of criminality will be discovered.[32] The concluding proviso to subsection 1(b) is intended to ensure that subsections 1(a) and 1(b) are read in conjunction: It makes clear that, when a specific individual's name comes to the attention of federal authorities during the course of an "umbrella" operation—as happened, for example in Abscam[33]—authorities must have a factually based, reasonable suspicion of criminality concerning that individual before offering him an inducement to engage in criminality.

The remaining provisions of section "1" articulate a higher threshold test that must be met before undercover techniques may be employed to infiltrate entities that were organized to further legitimate political, governmental, religious, or journalistic ends and before undercover agents or informants are allowed to impersonate certain types of individuals who are especially likely to elicit confidences from third parties. The higher threshold requires probable cause to believe that specific acts of criminality have been, are being, or will be committed. Investigations in such sensitive circumstances are considerably more intrusive than are conventional undercover operations, a fact acknowledged both by Director Webster (*see, e.g.,* FBI Statutory Charter: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 156, 159 (1978) (testimony of William H. Webster)), and, albeit in slightly different form, by the proposed FBI charter legislation (*see* S. 1612, 96th Cong., 1st Sess. § 531a(d) (1981)).

---

[31] This obligation is facilitated by the reporting requirements elsewhere recommended by the Select Committee, in particular by Recommendation as to Administrative Directives A(5)(i)(*v*) and B (*See* pp. 31–32 *supra.*)

[32] This imposes a requirement of some specificity in the planning and implementation of the operation. General authorization requests—for example, that which appeared in the "catch-all" provision of the Abscam authorization document (*see* pp. 15–16 *supra*)—would not be proper. Also, an application, like the Goldcon application, that lists many different targets, many different criminal activities, and many different geographic areas would have to state articulable facts justifying each aspect of the proposed investigation. It simply will not do, for example, to allow field agents who have stated articulable facts justifying an investigation of narcotics sales in Cleveland to use those narrow facts to justify an investigation of stolen property in Toledo or of racketeering in Akron.

[33] Under the proposed standard it would have been improper for the FBI to use undercover techniques to investigate or to offer inducements to individuals, such as Senator Pressler, whose names were forwarded, without corroboration, by a wholly unreliable middleman such as Joseph Silvestri.

Where First Amendment interests are involved, the possibility of government infiltration can easily inhibit valuable, protected expression. Were agents of the executive branch to insinuate themselves into Congressional offices, for example, substantial separation of powers concerns would arise. The surreptitious placement of federal agents within political bodies may, over the long term, result in the agents' affecting significant decisions for those organizations.

Similarly, society has determined that assuring a free flow of information between private parties and those persons mentioned in subsection 1(d) is so important that privileged communications are inadmissible even at criminal trials. The use of agents posing as lawyers, physicians, clergymen, or reporters may have a considerable inhibitory effect on the exchange of such privileged information.

Most importantly, use of the undercover techniques mentioned in subsections 1(c) and 1(d) is more likely than are conventional wiretaps or searches to reveal legal, but intensely private, information that people seek to protect, for each of those undercover techniques elicits information by winning the confidence of unsuspecting persons and thereby exposing their innermost thoughts. The Select Committee therefore believes that, in these circumstances, the balance between privacy and law enforcement should be weighted in favor of the individual.

Similar factors motivated the Select Committee's proposal in section "2." As Fourth Amendment law has shown, privacy interests can be safeguarded in two ways: (1) By imposing stricter requirements on the use of intrusive techniques; and (2) by lodging the approval authority as far as possible from the law enforcement agent who personally is involved in, and hence has the greatest stake in, and the worst perspective on, the operation. The Select Committee's proposed section "2" employs the latter principle. The authority to approve routine, unexceptional uses of the undercover technique is vested in an SAC or equivalent local official, thereby removing the decision at least one level from the field agent. Where the proposed undercover activity is more intrusive or more dangerous—where First Amendment interests are involved, for example, or where there is the possibility of harm to third parties—the proposal requires consideration and approval of the operation at FBI HQ by the Undercover Operations Review Committee, which, being a second step removed from the field, brings greater perspective and an increased objectivity to the decision.

The value of this approach is recognized by the current FBI Undercover Operations Guidelines, which properly require prior approval by the Undercover Operations Review Committee whenever a significant range of "sensitive circumstances" may be implicated by the investigation.[34] Similarly, the Select Committee proposal re-

---

[34] Paragraph B of the FBI Undercover Operations Guidelines lists 12 sensitive circumstances, among them that the investigation may involve a public official, foreign government, religious or political organization, or the news media; that the investigation may involve untrue representations concerning the activities of an innocent person; that an undercover agent or informant may engage in serious criminality during the course of the operation; that an undercover operative may attend a meeting between a target and his attorney; that an undercover operative may

Continued

quires that the delicate probable cause determination mandated by subsections 1(c) and 1(d) be made by the Undercover Operations Review Committee.

The Select Committee's proposed section "2" does not establish the procedures to be followed by law enforcement officials in making the decisions required by section "1"; the Department of Justice is in the best position to devise a realistic and workable procedural framework. This legislative approach, however, should not be understood to denigrate the seriousness of the responsibility entrusted to the Undercover Operations Review Committee and to the SACs. To be adequate, any set of procedures must ensure that all relevant information is made available to the decisionmaking authority in a timely fashion. It must guarantee that crucial information, including the facts supporting the finding of reasonable suspicion or probable cause, is memorialized, so that the efficacy of the decisionmaking process and the responsibility for given determinations can be assessed after the fact.

Nevertheless, recognizing the need for flexibility in the world of law enforcement, the Select Committee's proposed section "3" allows for a departure from established procedures when exigent circumstances make noncompliance necessary to prevent serious injury to persons or property, to bar the destruction of evidence or the escape of a suspect, or to forestall similar harm. Again, however, this is intended to provide only a narrow exception to the generally applicable requirements. Thus, the proposal requires that, when both sensitive and exigent circumstances are present, a complete application for approval must be forwarded almost immediately to the Undercover Operations Review Committee; if the Undercover Operations Review Committee concludes that the action taken in the field was not justified, both the Director and the Attorney General should be fully informed of the circumstances surrounding the operation. The Select Committee believes that these steps are essential to place responsibility for making sensitive judgments at the proper levels, while permitting an effective internal review of compliance with legislative and administrative requirements.

The recommendations outlined above should not unduly impede legitimate law enforcement efforts. The Select Committee's proposal requires no approval or review by a court or by anyone outside the Department of Justice before an undercover operation may be initiated, expanded, continued, extended, or terminated. Instead, in large part the Select Committee's proposals reflect current practice: Officials of the FBI and of the Department of Justice have testified that undercover operations typically are not initiated in the absence of a reason to believe that criminal activity is afoot. (*See, e.g.,* FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. 131-32 (1980) (statement of Philip B. Heymann); FBI Charter Act of 1979: Hearings on S. 1612 Before the

---

pose as an attorney, physician, clergyman, or member of the news media; that the operation poses a significant risk of violence, or of financial loss to innocent individuals; and so on. The Select Committee believes that this is a reasonably complete list, although the citation to it in proposed section "2" is not meant to foreclose the Department of Justice from adding additional categories of sensitive circumstances.

Senate Comm. on the Judiciary, 96th Cong., 1st Sess., Pt. 1, at 109-10 (1979) (testimony of Charles F. C. Ruff and Francis M. Mullen, Jr.).) Indeed, it is difficult to see why law enforcement officials would legitimately need to use intrusive and often expensive undercover investigative techniques in the absence of articulable facts constituting evidence of criminality.

The Select Committee nevertheless strongly believes that legislation is needed to express the will of Congress that law enforcement undercover operations be firmly grounded on a factual basis and be free from arbitrariness and abuse. Nothing in current law would prevent drastic dilution of existing guideline requirements. Indeed, at least one former ranking official of the Department of Justice actually has advocated the use of undercover techniques as a preliminary investigative tool even in the absence of circumstances giving rise to a reasonable suspicion that criminal activity has occurred, is occurring, or is likely to occur. (*See* Sel. Comm. Hrg., July 29, 1982, at 136-37 (testimony of Irvin B. Nathan).) Pressures to use the undercover technique in an unregulated manner inevitably will rise as the number of such investigations increases and as the supervision of any given operation becomes correspondingly more difficult. Indeed, during Abscam the Department of Justice authorized the use of undercover techniques against any public official whose name was mentioned by any corrupt individual, no matter how obviously unreliable the information.[35] Equally as important, legislation is necessary to close major unnecessary gaps in the existing guidelines, which in at least some circumstances clearly permit the use of undercover techniques in the absence of a reasonable suspicion of criminality.

D. Explanation for the Select Committee's Rejection of a Judicial Warrant Requirement

As noted in the opening pages of this report, many informed individuals and organizations, including some of the FBI's staunchest advocates, have argued that a judicial warrant should be required before an undercover operation is initiated or an informant is used, at least in sensitive circumstances. The arguments they have presented are undeniably compelling. First, undercover operatives and informants are law enforcement weapons that as a general rule are at least as intrusive as searches and wiretaps, for which warrants are required. It therefore seems logical to impose equivalent safeguards on the use of each of these investigative techniques.

Second, in undercover operations, no less than in other cases involving attempts to obtain information about private parties, privacy interests are more likely to be given their due when crucial decisions are made by a neutral magistrate. Thus, the Supreme Court's Fourth Amendment decisions are based squarely on the proposition that "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." (*United States* v. *United States District Court*, 407 U.S. 297, 317 (1972).) FBI and Justice Department officials are, after all, professional law enforcement personnel; their primary responsibility lies in catching criminals and preventing crime. No matter how well-intentioned or sensitive to other societal interests such officials may be, their judgments inevitably will be weighted in favor of their law enforcement mission. This common sense judgment has been recognized by the Supreme Court in its interpretation of the Fourth Amendment and by Congress in the recent enactment of the Foreign Intelligence Surveillance Act.[36]

---

[35] Department of Justice officials testified that this practice was necessary to avoid claims of political targeting, as demonstrated by the Department's ability to insist today that contacts were in fact pursued with every figure whose name was mentioned. (*See, e.g.*, Sel. Comm. Hrg., July 29, 1982, at 121 (testimony of Irvin B. Nathan).) In fact, however, the Department's Abscam practice permits informants and middlemen to engage in targeting of their own. (*See* pp. 68-77 *supra*.) In the Select Committee's view, a firmer safeguard against charges of political decisionmaking, and one far more considerate of innocent citizens and civil liberties, would be the evenhanded application of consistent formal threshold requirements, with determinations and the supporting material memorialized in writing.

Despite the appeal of these arguments, however, the Select Committee is not persuaded that a warrant requirement would solve more problems than it would create. It is not at all clear that imposing a warrant requirement on the use of informants and undercover agents would be manageable. There is little nuance to conventional searches or wiretaps; those law enforcement activities either do or do not take place; and, after the search or wiretap has been undertaken, it generally is easy enough to determine whether police officials complied with the terms of any previously obtained warrant. In marked contrast, there is a wide range of possible informant-government relationships, and the evolution of any given relationship may be extremely difficult to predict. Thus, for example, it is impossible to obtain a warrant before making use of a one-time informant who comes forward to volunteer information after the fact.[37] It seems almost as difficult to see how a meaningful warrant application could be made for permission to use a part-time or occasional informant who intermittently learns of and voluntarily offers information about criminal activity.[38]

An undercover warrant requirement is impractical for other reasons, as well. The decision whether to use an informant often of necessity will be made on the spur of the moment, since—unlike the decision whether to conduct a search or to install a wiretap—the informant's willingness to provide information may not be a product of the government's initiative; rather, the cooperating individual may simply appear with an offer of useful information. In a related vein the necessity of going outside the law enforcement agency to obtain judicial approval for the use of an informant might well inhibit private parties from providing information to the authorities, for fear that their identities will be divulged. (*See* FBI Statutory Charter: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 47–48 (1978) (testimony of James Q. Wilson).) Perhaps more importantly, both the role of an informant who must regularly interact with suspects and the general course of an undercover operation are inherently less predictable than are searches or wiretaps. Thus, it often would be impossible to establish the terms and limits of an undercover warrant with sufficient clarity to make the judicial approval process meaningful. This, in turn, would make judicial supervision—and even an ultimate determination about compliance with the warrant's requirements—extraordinarily difficult.

---

[36] The Foreign Intelligence Surveillance Act creates a judicial warrant requirement for national security wiretaps. 50 U.S.C. §§ 1801-1811 (Supp. III 1979.)

[37] Indeed, it is difficult to see the justification for requiring a warrant in such a situation, which is analogous to that presented when a private party searches another individual's home and provides to the police evidence that he discovers.

[38] As former Assistant Attorney General Heymann has noted:

> [T]he scope of informants' tasks covers . . . [a] wide continuum. Some, like a bartender in a mob hangout or a streetwise addict, provide information over a long period of time regarding many crimes and suspected criminals. Others, like an associate in a jury-tampering scheme, are targeted to generate information regarding one individual involved in a single crime. The wide range in the activities of informants and their relationship to the Government make it extremely difficult to get the judiciary into the process. For example, would a warrant be required to accept information volunteered by an observed narcotics seller—the seller knowing he has been observed—or is a warrant needed only when the seller has been arrested? Or, does the warrant become necessary when he has been charged, or when information has been paid for in some fashion? If the warrant would be required and would permit the addict to inform against his supplier, would a new warrant be needed if the informant then develops new information about a different supplier or about nondrug-related crimes? The range of relationships between an informant, his testimony, and the Government is very broad.

(FBI Statutory Charter: Hearings Before the Subomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 40 (1978) (testimony of Philip B. Heymann).)

There also are more basic institutional reasons for rejecting an undercover warrant requirement. The Select Committee has some reluctance to mandate the placement of a pre-operation judicial imprimatur on undercover operations that may later culminate in claims of entrapment or due process violations that must be judicially reviewed. Also, enacting a judicially enforceable warrant provision would surely lead to a substantial increase in litigation, court congestion, and delays in the administration of justice, because it would encourage defendants to make suppression motions not only on traditional Fourth Amendment grounds, but also on the basis of noncompliance with undercover warrant legislation.

The Select Committee emphasizes, however, that its conclusion on this point is conditional: it rests on the belief that law enforcement authorities can be expected to comply in good faith with the reasonable suspicion and probable cause requirements proposed elsewhere in this section, if those requirements are stated as the will of Congress. Accordingly, the Select Committee's position should not be read as an unconditional rejection of the warrant requirement for all time and in all circumstances. If experience under the proposed legislation were to show that federal law enforcement agencies are unable or unwilling to regulate themselves effectively, the establishment of a judicially enforceable warrant mechanism, at least in limited and precisely defined circumstances, might well be wise. For the moment, however, it is the Select Committee's conclusion that the drawbacks of a warrant requirement outweigh the advantages.

IV. A Recommendation for Indemnification Legislation

The Congress, through its appropriate committees, should consider legislation to compensate from the United States Treasury persons (other than persons cooperating with or employed by the Department of Justice in connection with the undercover operation) injured in their person or property as a result of a Department of Justice undercover operation, under the following conditions and circumstances:

1. the injury was proximately caused by conduct, of a federal employee or of any other person acting at the direction of or with the prior acquiescence of federal law enforcement authorities, that violated a federal or state criminal statute during the course of and in furtherance of a Department of Justice undercover operation;

2. the injury was proximately caused by conduct, of any federal employee or of any informant or other cooperating private individual, that violated a federal or state criminal statute and that the person who engaged in such conduct was enabled to commit by his participation in an undercover operation; or

3. the injury was proximately caused by negligence on the part of federal employees in the supervision or exercise of control over the undercover operation; provided, however, that an action should not lie under this legislation for injury caused by operational or management decisions that relate to the conduct of the undercover operation.

Although undercover operations often yield substantial benefits, undercover investigative techniques also pose unique dangers. The Select Committee's other recommendations—in particular, those directed at improving the supervision of operations and at facilitating enhanced Congressional oversight—may reduce those risks, but the peculiar characteristics of undercover investigations make it inevitable that injury to innocent citizens occasionally will occur. The immediately preceding sections of this report, which deal with entrapment and the initiation of undercover operations, therefore offer proposals aimed in part at preventing injuries to innocent subjects of undercover operations and in part at providing remedies for such injuries when they occur. This section, on the other hand, addresses the dangers that undercover techniques pose to the public at large.[39]

The Select Committee's conclusion, spelled out more fully below, is that Congress should create a mechanism that can be used, under the appropriate specified circumstances, to indemnify individuals who are injured during the course of an undercover operation. Two overriding considerations would be served by such legislation. First, it seems inequitable to make innocent citizens who fortuitously happen to be in the wrong place at the wrong time bear the foreseeable costs of law enforcement efforts. Second, there is likely to be considerable public resentment of government, as well as significant opposition to the use of undercover law enforcement efforts, if law enforcement officials are permitted to inflict substantial harm on innocent individuals who have no legal recourse.

A. The Nature of the Problem

The magnitude of the problem in this area can be gleaned from recent litigation. As of November 4, 1982, the FBI alone had been subjected to 27 law suits arising out of undercover operations. The plaintiffs in those proceedings sought aggregate damages running into the hundreds of millions of dollars. (*See* Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr., at 2-7 (Nov. 4, 1982).) This is not to suggest that any substantial number of those claims are valid, of course, but this body of litigation nonetheless provides an idea of the number of individuals who believe themselves to have been aggrieved by undercover law enforcement efforts. It also reveals some of the issues that may arise in this area in the future.

---

[39] These latter types of injuries may also be inflicted upon innocent targets, of course, and a target who is so injured would have an action under the Select Committee's other proposals.

1. Types of injury

Injuries caused to the public by undercover operations fall into three general categories.[40] The first and seemingly most common type of harm involves independent fraudulent or other criminal activity conducted outside the operation by an informant who uses the operation's scenario in a manner unrelated to the operation's law enforcement purposes. Abscam's Melvin Weinberg, Palmscam's Joseph Meltzer, and Frontload's Norman Howard caused harm in this manner.

Undercover operations, of course, often rely upon professional confidence men whose ability to penetrate the criminal community may be crucial to the investigation's success. Their participation in an undercover enterprise may, however, present such individuals with an irresistible, government-created cover for use in crimes against innocent citizens. That apparently was the case in Abscam, in which one-time FBI informant Meltzer used his knowledge of the mechanics of the operation to defraud victims. The same phenomenon is illustrated more dramatically by Operation Frontload, in which informant Howard took advantage of his government-provided cover to issue millions of dollars worth of fraudulent construction performance bonds, while collecting hundreds of thousands of dollars in premiums from unsuspecting clients.

The second category of public injury is that resulting from criminal acts committed by agents or informants in furtherance of the operation's legitimate aims. The existing Guidelines for FBI Undercover Operations expressly contemplate the authorization of agents to engage in harmful criminal activity (*see* Attorney General's Guidelines on FBI Undercover Operations ¶ B(c) (Jan. 1981)), and the Select Committee's proposals do not foreclose that possibility. This is because there may be circumstances in which destructive behavior by law enforcement agents would be justified; if, for example, law enforcement authorities are attempting to penetrate an extortion-protection ring that has caused millions of dollars worth of property damage, an agent might be entirely justified in smashing windows or engaging in other minor property crime, if those actions are necessary to preserve his cover. Similarly, there have been allegations that in the notorious Gary Rowe case an FBI informant engaged in violent activity during the course of his federal employment. (*See* FBI Charter Act of 1979, Hearings on S. 1612 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess., Pt. 2, at 8–11 (1979).)

---

[40] There is a fourth category of possible harm: harm inflicted on private parties who cooperate with federal authorities in creating a cover for undercover activities; for example, the Chase Manhattan Bank and the New Hampshire Insurance Company, which provided covers in Abscam and Frontload, respectively, were sued by victims of Joseph Meltzer's and Norman Howard's illegal activities. The Select Committee has addressed this problem elsewhere by recommending that the Department of Justice be empowered to execute indemnification agreements with cooperating individuals. (*See* Legislative Recommendation A4(e), p. 26 *supra*. *See also* pp. 359-60 *supra*.)

Of a different nature are allegations concerning the FBI's recent operation Recoupe, an investigation aimed at penetrating stolen car rings, in which an FBI front apparently sold wrecked cars to "retaggers," who transferred the automobile serial numbers to stolen vehicles. Plaintiffs in suits against the FBI growing out of the operation have alleged that law enforcement agents engaged in "racketeering" by selling the stolen vehicles to unwitting middlemen, who in turn sold the cars to innocent buyers. (*See* Taylor, FBI's Use of Con Men to Catch Other Crooks Occasionally Backfires, *Wall Street Journal,* Oct. 7, 1982, at 16, cols. 2–3.)

Finally, there is a limitless variety of situations that can be grouped because the harm in each was, in a sense, caused by the very existence of the operation. A comprehensive list of such situations cannot be compiled, because the nature of the various injuries is as varied as are the operations themselves. It is worth noting several examples that may be typical, however, to give some sense of the types of difficulties that can be expected. First, it is possible that, to avoid destruction of the operation's cover, goods recovered during the course of the undercover operation will not be promptly returned to the owner and that the owner, not knowing that his property has been recovered, will make unnecessary expenditures.[41] Conversely, an innocent citizen may learn of the operation's scenario through legitimate means and rely on his belief in the reality of the scenario while making independent business judgments. In Abscam, for example, a legitimate investor might have been led by one of the targets to believe that Arab sheiks were depositing hundreds of millions of dollars in the Chase Manhattan Bank and might have purchased Chase Manhattan stock in reliance on that information. A third example is more direct: The existence of an undercover operation might stimulate illegal activity, at least in the short run, resulting in an innocent person's becoming the victim of a crime that would not have occurred but for the operation.[42] Finally, even apart from the law enforcement aspects of an operation, competition from a government proprietary may harm legitimate businesses.

2. Existing law

While many of the types of harm described above have, at least allegedly, occurred, it is not at all clear which, if any, can be remedied under existing law. There is no existing statutory indemnification scheme explicitly relating to undercover operations. In the absence of such legislation, plaintiffs in suits against the FBI have relied principally on the Federal Tort Claims Act of 1946, 60 Stat. 842 (codified in scattered sections of 28 U.S.C.), which provides an action against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (28 U.S.C. § 1346(b) (1976).)

---

[41] Allegations to this effect were made following Operation Lobster. In 1979 Springmeier Shipping Company of St. Louis complained to the FBI that one of its stolen trucks had been recovered early in the Lobster operation, but had not been returned for a year while the operation was underway. Springmeier maintained that this failure promptly to return the vehicle cost the company over $60,000 in insurance premium adjustments, as well as its $5,000 deductible. The FBI declined to offer reimbursement.

[42] For example, fencing operations may stimulate property crime by providing a new market for stolen goods. (*See* FBI Undercover Guidelines: Oversight Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 40–41 (1981) (testimony of Gary T. Marx).)

It is not clear, however, that the harms described above are actionable under the Tort Claims Act. There appears to be no claim for relief against the government for independent criminal activities conducted by informants unless, as apparently was the case in Frontload, federal agents were demonstrably negligent in their supervision of the informant. Even if government employees were aware of the informant's criminal activities and, to avoid ruining the operation's cover, intentionally chose not to stop them (as allegedly occurred with respect to Meltzer), the government may be shielded from liability by the Tort Claims Act's exception barring any action "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." (28 U.S.C. § 2680(a) (1976).) For the same reason, the Tort Claims Act may not reach intentional criminal acts committed in furtherance of the law enforcement operation, whether undertaken by an informant or by a government employee.

Plaintiffs in cases arising out of undercover operations also have asserted constitutional claims of varying degrees of persuasiveness. While claims alleging violations of the takings clause or due process clause of the fifth amendment to the Constitution may be sound, the courts have not yet resolved those issues, and it is far from clear that even an individual who unquestionably has been wronged will be able to recover. In any event, insofar as such claims cannot be brought under the Tort Claims Act, the government has not waived its sovereign immunity as to any of them.

B. Proposed Legislation

In light of the dangers posed by undercover operations and the apparent inadequacy of current remedies, the Select Committee recommends creating a cause of action explicitly designed to compensate innocent citizens for some of the injuries arising out of undercover operations. Such legislation will provide for redress for victims in appropriate limited circumstances, no matter how the courts interpret existing law. In drafting its proposals the Select Committee has not attempted to modify the scope of existing remedial statutes; instead, it has suggested a new, narrowly focused remedial scheme that will not adversely affect law enforcement operations and will assure a remedy for most of the individuals who suffer harms clearly traceable to the use of undercover techniques. This legislative course is not unusual: Congress has not hesitated in the past to create remedies for persons harmed by particular types of law enforcement conduct. (*See, e.g.,* Privacy Protection Act of 1980, § 106, Pub. L. No. 96-440, 94 Stat. 1879-83 (codified at 42

U.S.C. §§ 2000aa, 2000aa-5 to 2000aa-7, 2000aa-11, 2000aa-12) (Supp. IV 1980).)

Section "1" of the Select Committee's proposal would create a cause of action for harm directly resulting from illegal activity undertaken by agents or by informants acting legitimately to further an undercover operation's law enforcement purposes. Because harms of that nature are one of the direct, foreseeable costs of law enforcement, and because the benefits of crime prevention are enjoyed by the general public, it is arbitrary and inequitable to maintain a system that imposes those costs on a small number of randomly affected citizens. Less tangibly, but equally importantly, public disrespect and antagonism for law enforcement agencies is likely to be generated if those agencies are allowed, by themselves violating the law, to harm innocent individuals. That disrespect and antagonism can only be compounded if injured innocent citizens are not provided with an effective remedy. Further, to allow the government knowingly to make particular citizens or groups of citizens the victims of crime is to grant a power that is subject to abuse and selective use, a danger that may be ameliorated by legislation along the lines proposed in section "1."

The Select Committee's second proposal, section "2." would create a claim for relief for individuals harmed by the independent illegal activity of an informant or government employee[43] who was enabled to commit his crime by virtue of his participation in an undercover operation. This proposal is not aimed at all illegal conduct engaged in during the course of an investigation; the proposed provision applies only when the operation in some sense provided the means by which the criminal act was committed. Examples of this sort of activity are the actions of Joseph Meltzer and Norman Howard, whose knowledge about the mechanics of undercover enterprises enabled them to defraud innocent parties. The proposal is not limited to fraudulent conduct, however, and would apply to other types of criminal activity that an informant could not have committed had he not been a participant in an undercover operation.

Several factors support the imposition of liability in the circumstances described above. Again, it is equitable to reimburse innocent victims of the criminal conduct that, unfortunately, appears inevitably to accompany and to be made possible by at least some number of undercover operations. Imposing liability in such circumstances might also have the salutary effect of encouraging federal authorities to supervise more effectively the activities of informants, while giving law enforcement personnel an additional reason to remain constantly aware of the dangers presented by the use of undercover techniques. Moreover, FBI officials have expressly recognized that the use of professional criminals in law enforcement undercover activities poses substantial risks of harm to innocent citizens; if the government is to create an environment in which these harms might occur, it should, like owners and managers of dangerous enterprises at common law, bear the costs that materialize out of those risks.

---

[43] Fortunately, there have not been allegations of such impropriety on the part of government agents. Federal employees will have the opportunity to commit offenses of that type, however, and failure to cover them in this provision would create an unnecessary gap.

The Select Committee's final indemnification proposal would create government liability when the plaintiff's injury was proximately caused by negligence on the part of federal employees in the supervision or exercise of control over the undercover operation. This proposal aims at negligence in what might be termed the procedural aspects of the operation—the supervision and implementation of the investigation. To a certain extent this overlaps with proposed section "2": Norman Howard's actions in Frontload, for example, would fall under both provisions.[44] Proposed section "3," however, reaches further: If, for example, federal agents became, or should have become, aware that someone who was not a government informant had discovered an undercover scenario and was using it to defraud innocent third parties, but the federal agents unreasonably failed even to investigate the possibility of taking action to protect those innocent parties, a claim would arise under the Select Committee's proposal.

The proviso to proposed section "3"—that an action should not lie for tactical decisions relating to the conduct of the operation—is intended to make clear that courts should not be required to judge the reasonableness of considered law enforcement decisions that were taken to advance the legitimate purposes of the investigation. Thus, questions about whether a given operation is too dangerous and whether the benefits of a given action outweigh the risks should not be subjected to a judicial cost-benefit analysis after the fact.

Concededly, this results in something of an anomaly: Negligence in the supervision of an operation will lead to federal liability, while a conscious law enforcement decision to proceed despite considerable risks to the public will not. But this arrangement is intended to achieve a particular end. The Select Committee believes that it would be unwise to subject to scrutiny by the courts the implicit and explicit cost-benefit determinations that must be made during the course of any law enforcement operation. Such a scheme would discourage law enforcement initiative, often would lead to entirely speculative verdicts, and occasionally would require the disclosure of confidential law enforcement information and materials. Proposed section "3" is intended to leave discretionary law enforcement decisions in the hands of law enforcement authorities, as is generally the case with respect to conventional law enforcement tactics. But, because of the peculiar dangers of undercover operations, proposed section "3" is designed to encourage authorities to exercise careful supervision over such operations. The aim is to ensure that cost-benefit decisions made by the authorities are well-informed, intentional, and properly implemented.

The remedial scheme spelled out above will not provide indemnification for everyone who suffers harm resulting from the existence of an undercover operation. Practical reasons require some limits. It is nearly impossible to prove, for example, that a given crime suffered by an innocent party was inspired by a government sting operation or that a given business decision was grounded on the businessman's belief in the undercover scenario.[45] Thus, for example, it may well be that when an undercover fencing operation is established, more thefts occur in the immediate vicinity of the front than would otherwise have occurred, because the market for stolen goods is larger; but no one victim whose property has been stolen during the operation will be able to prove that his particular property would not have been stolen in the absence of the front.

---

[44] Double recovery in such circumstances is not envisioned.

In contrast, the narrow circumstances delineated in sections "1" and "2" provide particularly attractive cases for indemnification. The nature of the harm in such cases is clearly and demonstrably traceable to the undercover operation. Such harm is a plainly foreseeable result of the use of undercover techniques; and, in a sense, injuries of that type are particularly offensive, because the harm they inflict was intentionally brought about by someone working for the government.

In cases covered by proposed sections "1" and "2," then, it seems appropriate to provide a cause of action regardless of the propriety of the law enforcement decisions involved and notwithstanding the unavoidability of the harm in a given case. This is not true of other types of injuries stemming from undercover operations, however, and the Select Committee has concluded that it would be wiser not to create relief for such injuries than it would be to allow litigation over the propriety of given law enforcement decisions.

V. EXPLANATION FOR THE SELECT COMMITTEE'S REJECTION OF PROPOSALS TO MAKE DEPARTMENT OF JUSTICE GUIDELINES JUDICIALLY ENFORCEABLE

Another legislative proposal considered by the Select Committee was one that would make the Department of Justice guidelines judicially enforceable. Adopting this proposal would in practice mean that a federal law enforcement agency's failure to comply with a guideline requirement would result in the judicial voiding of any conviction obtained through the use of a flawed undercover operation. While the argument in support of this proposal is cogent, the Select Committee is unconvinced that it warrants legislation.

Under existing law it is clear that noncompliance with internal law-enforcement guidelines is not a valid defense to a criminal charge. The Supreme Court so held, in reviewing a conviction obtained through an Internal Revenue Service undercover operation, in *Caceres* v. *United States,* 440 U.S. 741 (1979), where the Justices concluded that technical violations of guideline requirements should not lead to the overturning of a conviction on either due process or statutory grounds.

The proponents of judicially enforceable guidelines have advanced a simple and appealing argument against *Caceres:* They have argued that police will take guidelines seriously only if failure to comply will result in the loss of a conviction. In the absence of judicial oversight, the argument continues, there will be an inevitable tendency for law enforcement authorities to cut corners, and the guidelines will be complied with only when compliance is convenient. (*See* FBI Undercover Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 30 (1981) (testimony of Louis Seidman); *id.* at 56-57 (statement of Paul Chevigny).)

---

[45] Indeed, the need for recovery becomes less compelling as the government's involvement in the injury becomes less direct. In the Lobster situation alluded to above, for example, the Springmeier company's claims are not particularly compelling; had it not been for the law enforcement operation challenged by the company, the shipper's losses would have been total.

This line of reasoning is similar to that advanced in favor of a judicial warrant requirement, and the Select Committee's reaction here is similar to its conclusion in the warrant context. (*See* pages 387-89 *supra.*) This reluctance to recommend legislation is based on several considerations. Perhaps most importantly, voiding a conviction can be an overly severe sanction for what may be a technical violation of guideline requirements. It is one thing to exclude evidence for failure to comply with search and seizure requirements constitutionally imposed by the Fourth Amendment, but it is quite another thing to void a conviction because, for example, federal agents failed to obtain approval from the Undercover Operations Review Committee for an operation that cost more than $20,000. (*See* Attorney General's Guidelines on FBI Undercover Operations ¶ A(g) (Jan. 1981).) Conversely, fear of running afoul of the judiciary may lead Department of Justice officials to dilute guideline requirements in an attempt to minimize the risk of violations. To this extent, making guidelines judicially enforceable may adversely affect the maintenance of effective control over law enforcement efforts and lead to demands to replace guidelines with detailed statutory specifications for law enforcement techniques.

Also, even if only the most significant guidelines are made enforceable, such action inevitably will lead to a substantial amount of litigation. That in itself is highly undesirable, especially in view of the already considerable delays in the criminal justice system. Further, such litigation will probably result in the undesirable repeated disclosure of sensitive law enforcement data.

Consistent noncompliance with guideline requirements, if it occurs, might necessitate a reassessment of the Select Committee's conclusion. For the moment, however, the Select Committee finds that it would be inadvisable to disturb *Caceres.*

APPENDIXES

APPENDIX A

CHRONOLOGY OF ABSCAM

The factual narrative that appears in this Appendix does not purport to be exhaustive; rather, it attempts to identify the principal participants and events of a complex undercover operation that lasted for approximately two years. With several exceptions the narrative is confined to factual statements that have not been disputed and that do not rely solely upon uncorroborated testimony or statements made by interested parties. Various controversial events, together with the conflicting versions of those events that have been advanced by interested parties, are discussed at length in the sections of the Report that precede this historical narrative.

The Federal Bureau of Investigation undercover operation known as Abscam received formal FBI Headquarters approval on July 25, 1978 ([Deleted])[1]; but events significant to an understanding and evaluation of the operation occurred much earlier. In particular, because Melvin C. Weinberg, the informant used by the FBI in Abscam, played a major and controversial role in the operation, a description of Abscam best begins with the establishment of the first relationship between Weinberg and the FBI.

PRE-1978

Department of Justice files show that the FBI first formally opened Weinberg as an informant on June 3, 1969. ([Deleted]) Weinberg testified that, although he was unsure of the date, he thought he had begun acting as an informant as early as 1965.[2] (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 9 (testimony of Melvin C. Weinberg).) At least in 1969 and in the first half of the following decade, Weinberg sporadically provided the FBI with information about criminal activities of other individuals.

During that entire period Weinberg participated in and profited from criminal activities, including the use of stolen credit cards, income tax evasion, and fraud. (*See* R. Greene, *The Sting Man* 39-57 (1981).) In early 1976 the FBI obtained information leading it to believe that Weinberg might be engaged in criminal activity; and on April 6, 1976, the FBI's New York Field Office[3] informed FBI Headquarters ("FBI HQ") that Weinberg had been defrauding victims. ([Deleted]) Accordingly, on April 7, 1976, FBI HQ ordered the New York Field Office immediately to discontinue Weinberg as an informant. ([Deleted])

---

[1] The omission of a citation to a confidential document is identified by "[Deleted]." *See* pp. V-V1 *supra*.

[2] Weinberg's testimony is not necessarily inconsistent with Department of Justice files, but it does reflect one of the problems inherent in the FBI's internal use of arcane definitions inconsistent with definitions published to the public and to Congress. On September 2, 1982, FBI officials informed counsel to the Select Committee that in FBI parlance a person is not called an informant unless there is an FBI "137" file naming him as a informant. Thus, even if Weinberg surreptitiously provided information to the FBI from 1965 to 1969 and continued to perform the identical function thereafter, he was not "an FBI informant" until June 3, 1969, when a 137 file on him was opened.

The Attorney General's Guidelines on FBI Use of Informants and Confidential Sources define "informants" differently. The guidelines define that term by reference to the function performed by the individual, not by reference to the opening of a file. Specifically, the guidelines state at page one:

(1) A confidential source, under these guidelines, is any person or entity furnishing information to the FBI on a confidential basis, where such information has been obtained as a result of legitimate employment or access to records and is provided consistent with applicable law.

(2) An informant, under these guidelines, is any other person or entity furnishing information to the FBI on a confidential basis.

[3] The FBI has 59 Field Offices located in major metropolitan areas throughout the country.

On January 11, 1977, pursuant to his investigation of Weinberg's sham investment company, London Investors, FBI Special Agent John M. McCarthy of the New York Field Office arrested Weinberg in New York. ([Deleted]) It was, McCarthy told the Select Committee, the first time McCarthy and Weinberg had met.

Weinberg was released on the basis of his promise to the court to submit himself to be arraigned in Pittsburgh, Pennsylvania, where a case against him arising out of the same conduct was being presented to a federal grand jury. On February 17, 1977, that grand jury indicted Weinberg on ten counts of wire fraud, mail fraud, and criminal conspiracy based on his London Investors activities. Eight days later, he appeared in Pittsburgh for arraignment and was arrested. He was released pending trial, and on March 16, 1977, was arrested in Florida in a separate matter involving fraudulent securities. He was again released pending his trial in Pittsburgh.

Shortly thereafter, an FBI special agent in Pittsburgh telephoned Special Agent Myron Fuller of the New York Field Office to suggest that Weinberg might be able to assist in Fuller's undercover investigation of the white collar crime and organized crime network in New York City. That investigation was called Operation Fountain Pen. In June 1977 Fuller contacted Weinberg and agreed to use him. Their agreement called for Weinberg to focus his efforts on Fuller's investigation of an attempt by various organized crime figures and con-men, including Jospeh Trocchio, illegally to acquire the assets of the Brookhaven Mortgage Company in New York. If Weinberg were to be helpful, the FBI would try to help him in plea bargaining and sentencing in the case pending against him in Pittsburgh. In addition, the FBI agreed to pay for expenses incurred by Weinberg in the course of the investigation. Fuller has informed the Select Committee that, although he and his supervisor, Special Agent Cunningham, reviewed Weinberg's closed informant file sometime in 1977, they did not discuss the advisability of using Weinberg in an undercover operation, the risks attending the use of an informant whose file had been closed because he had been caught committing felonies while acting as an FBI informant, or the possible use of special safeguards to monitor and to control such a person.[4]

In mid-July 1977, Fuller and Weinberg began to work together, and it was then that the FBI first used the fictitious-Arab scenario on which Abscam eventually was based. Weinberg, using his own name, held himself out to his criminal contacts as having been hired by some wealthy Arabs to find investment opportunities in the United States. Fuller adopted an undercover identity, and Weinberg introduced him as the Arabs' financial consultant. This was Fuller's first undercover role.

Fuller told the Select Committee that the undercover operation lasted until October 1977. During that period, Weinberg introduced Fuller to several persons whom have been described as "fringe organized crime figures," including Richard Sparer, Ray Claybrook, Luther Robinson, and William Hedley. Weinberg and Fuller, either individually or together, had and recorded more than 25 conversations with such figures between July 1, 1977, and October 26, 1977. Fuller cannot recall why those conversations were recorded. His recollection is that he gave no taping instructions to Weinberg; instead, Fuller planned to have Weinberg introduce him to the criminal figures and to proceed from there on his own. With respect to conversations between Weinberg and criminal figures in which Fuller did not participate, Fuller planned to debrief Weinberg and to prepare reports of material information. According to Fuller's account, therefore, the occasional recordings in August and early September were essentially fortuitous.

On October 3, 1977, Weinberg pled guilty to all ten counts against him in the federal court in Pittsburgh. On December 8, 1977, he appeared before the court for sentencing. Pursuant to the court's request, Special Agent McCarthy, who had arrested Weinberg in January and who had occasionally helped Fuller and Weinberg during their undercover operation from July to October, appeared in the court's chambers and described Weinberg's cooperative efforts. McCarthy informed the court that Weinberg could, if the court were to allow him to be available, assist the FBI, but the court sentenced Weinberg to three years in prison, staying execution of the sentence until January 10, 1978.

---

[4] Under Paragraph D of the current Attorney General's Guidelines on FBI Use of Informants and Confidential Sources (which were not in effect in 1977), a designated FBI official must make written findings of the suitability of an informant for a particular investigation before the informant may be used. Nevertheless, because the FBI's informant file on Weinberg had been closed as a result of his illegal activity in 1976, he was not technically an informant in 1977, even though he was performing an informant's function in every respect. Thus, Fuller's and Cunningham's failure to consider the factors described in the text above would not violate even today's guidelines. The Select Committee strongly recommends that the guidelines be amended to make even clearer that "informant" must be interpreted and applied functionally, not by the existence *vel non* of a 137 file.

On December 19, 1977, Special Agent John Good, Senior Supervisor of the Hauppauge, Long Island, Resident Agency[5] of the FBI's New York Field Office, signed a letter on behalf of J. Wallace La Prade, Assistant Director in Charge of the New York Field Office,[6] to the Chief United States Probation Officer for the Western District of Pennsylvania. The letter requested that the Probation Office and the sentencing court review Weinberg's file and agree to allow Weinberg to associate with "former colleagues" of his whom the FBI was "contemplating targeting."[7] On January 23, 1978, pursuant to that request and to a request by Weinberg's lawyer for a reduction of sentence for health reasons, the court put Weinberg on probation for three years and permitted him to associate with criminals and with persons suspected of having committed crimes. McCarthy replaced Fuller as Weinberg's FBI "contact agent," or agent responsible for supervising Weinberg's informant activities.

Special Agent McCarthy wrote the December 19, 1977, letter signed by John Good. McCarthy did so because, pursuant to discussions with Fuller, he had decided to try to continue, and to expand, the undercover operation conducted by Fuller from July to October, but to operate out of Long Island, where McCarthy was assigned. Before deciding to use Weinberg and to write the December 19 letter, McCarthy did not review Weinberg's closed informant file or learn why the file had been closed. He told the Select Committee that he had based his decision to use Weinberg on the recommendation of Weinberg's Pittsburgh FBI case agent, on Weinberg's cooperation in the summer of 1977, and on Weinberg's extensive knowledge of illegal financial activities.[8]

1978

In January and February of 1978, McCarthy, Fuller, and Weinberg discussed the formation of the new undercover operation. They decided to revive and to expand upon the fictitious-Arab cover, both because Weinberg had already established himself as a representative for wealthy Arabs and because none of the participants could think of a better cover. In March they decided to create a fictitious company, Abdul Enterprises, Ltd., of which McCarthy would be the chairman of the board of directors and Fuller would be the financial director. McCarthy gave the undercover operation the code-name "Abscam," a portmanteau word formed from "Abdul" and "scam."[9]

On February 23, 1978, the New York Field Office reopened Weinberg's informant file. McCarthy told the Select Committee that he did not recall any discussion about the file's having been closed because of Weinberg's criminal activity while acting as an FBI informant in 1976 or about any special safeguards that might be used during Abscam to prevent him from repeating that performance. McCarthy did say that, when he reopened Weinberg's file, he "must have" known why the file had been closed.

Supervisor John Good and Special Agent McCarthy decided to augment the cover by obtaining office space near the FBI's Hauppauge Resident Agency. Special Agents McCarthy, Fuller, Michael Denedy, Margot Denedy, Thomas McShane, and Edward Woods were given undercover roles.

In its incipiency, Abscam was not specifically approved by FBI HQ. At that time, each Field Office had authority to conduct an undercover operation that would not last longer than six months or require expenditures, other than regular salaries, exceeding $1,000. All that was required was the approval of the Special Agent in Charge ("SAC") of the Field Office. Nevertheless, the Select Committee's review of the Department of Justice files on Abscam revealed no document granting such approval or indicating a basis for estimating that the operation would last less than six months and cost less than $1,000.[10] The absence of any documented estimate of cost and duration is significant because, as early as April 12, 1978, three months before FBI HQ approval of the Abscam operation, Special Agent McCarthy reported to an SAC in the New York Field Office that, to establish the Abscam cover, (1) $200,000 in cash had been deposited in a safe deposit box in a New York bank; (2) up to $250,000 had been credited to the account of one of the undercover agents at that bank; (3) arrangements had been made to rent a twin-engine Beechcraft airplane to transport Abscam principals; (4) business cards were to be printed for each undercover agent; (5) arrangements were to be made to rent a limousine to transport Abscam principals between Manhattan and Long Island; and (6) arrangements had been made to rent a room at the Waldorf Astoria Hotel or at the Plaza Hotel for a meeting with subjects in New York. These facts suggest that, long before FBI HQ approval was sought, special agents in the New York Field Office knew that both the duration and the fiscal limits for an SAC-approved operation would be exceeded.

---

[5] Each Field Office has smaller Resident Agencies under its direction. Each Resident Agency ("RA") is headed by a Senior Resident Agent ("SRA"). If the RA has eight or more special agents, the SRA is a Supervisor.

[6] Because of the size and complexity of the New York Field Office, the person in charge of that office is an Assistant Director. He has four Special Agents in Charge (SACs) under him.

[7] This request to allow Weinberg to associate with suspected criminals was sent when Weinberg was facing a prison term and had not been granted probation. Apparently, McCarthy and Good thought that the sentence might be modified.

[8] Like Fuller, McCarthy did not prepare any memorandum discussing Weinberg's suitability for the contemplated undercover operation.

[9] Some early media accounts of Abscam in 1980 suggested that the code name was formed from "Arab" and "scam." FBI documents contemporaneous with the formation of the operation in early 1978 show those accounts to have been erroneous.

On February 17, 1978, through Weinberg's early Abscam efforts, the FBI recovered from Dominick Casarele stolen art worth approximately $1 million.[11] On April 3, 1978, the FBI paid Weinberg a lump sum of $10,000 for his help in that matter.[12]

During the period from mid-February to late April 1978, Weinberg arranged meetings between the undercover agents and two stolen-property suspects, and provided information on a major suspected Las Vegas organized crime figure, a suspected Long Island organized crime figure, and a suspected Brooklyn organized crime figure. The principal potential criminal activities discussed were the purchase from two of those suspects of stolen art, of stolen or counterfeit securities, and of securities "which belonged to Robert Vesco," and the involvement of one of them in the Brookhaven Mortgage Company takeover. (*See* [Deleted])

Only five conversations were recorded during this period before FBI HQ approval, one on March 11, 1978, three on April 7, 1978, and one on May 1, 1978. The next Abscam recording did not occur until September 12, 1978.

On May 26, 1978, the Assistant Director in Charge of the New York Field Office applied to FBI HQ for approval of Abscam for six months at a cost of $30,000. The application listed six specific objectives for the operation: (1) to recover misappropriated securities of Robert Vesco worth approximately $300 million; (2) to "compromise" a named suspect, apparently in connection with Brookhaven Mortgage Company and stolen or counterfeit securities; (3) to obtain access to phony financial dealings in Las Vegas, Nevada, and to underworld activities in Atlantic City, New Jersey; (4) to gain "intelligence information," including photographs and voice recordings, on New York underworld figures; (5) to recover stolen artifacts in Miami and elsewhere; and (6) to recover phony securities and to detect phony loans pertaining to a company operating on the West Coast and in Mexico. In addition, the application included a broad catch-all objective:

> The above objectives are representative, but not inclusive of a variety of accomplishments that can be obtained with this operation. Almost any door in the United States can be opened and recoveries of stolen securities and rare art or other stolen property filtered through the O[rganized] C[rime] network can be obtained. ([Deleted])

The application also contained a detailed description of how the requested $30,000 would be spent in the six-month period, itemizing expenses such as $1,000-per-month informant payments, office rental payments, and automobile lease payments. It contained no description of the informant, Weinberg; no discussion of his reliability; no discussion of how or by whom he would be monitored, controlled, or supervised; no discussion of the undercover experience and suitability of the several special agents being used in the operation; and no discussion of the risks of physical harm, of property loss, of invasions of privacy, of interference with confidential relationships, and of other possible untoward consequences.[13]

---

[10] The Abscam files first provided to the Select Committee by the Department of Justice contained no document reflecting approval of Abscam by any SAC before or during its first several months. The Select Committee therefore specifically requested the SAC approval document; the FBI agreed to provide it, but was unable to find it. It appears that no such document was prepared, and FBI officials have informed the Select Committee that no such document was required under policies in effect in 1978. Under the Attorney General's Guidelines on FBI Undercover Operations, promulgated many months later and in effect today, the SAC must prepare a written approval document containing detailed specified information justifying an undercover operation approved by him. The Select Committee considers this to be an important improvement.

The guidelines do not, however, require that a copy be sent to FBI HQ. The Select Committee recommends that the guidelines be amended to impose such a requirement and that the Undercover Operations Review Committee review each such document. This review would not have to be a thorough analysis, but one sufficient to enable the Review Committee to identify major potential problems and to be informed as to the nature of the SAC-approved operations being conducted.

[11] Casarele was convicted on March 25, 1982.

[12] Weinberg also received a $30,000 reward from an insurance company for the recovery. (*Kelly* Trial Tr. 1698.)

The application also stated that Thomas Puccio, Chief of the Department of Justice's Organized Crime Strike Force for the Eastern District of New York, approved of the operation. Puccio assigned the case to John Jacobs, an attorney who had joined the Strike Force in February 1978 after having spent several years as a prosecutor in the office of the Manhattan District Attorney. Jacobs told the Select Committee that he retained principal Strike Force responsibility for the case until March 1979, when Puccio assumed an active day-to-day role.

On June 27, 1978, FBI HQ agreed to approve Abscam for the period ending January 25, 1979, at a funding level of $30,000, as requested. ([Deleted]) Final approval was granted by Associate Director James Adams, although the application was first reviewed and approved by several FBI officials under him.[14] An approval letter was sent to the Assistant Director in Charge of the New York Field Office on July 25, 1978, officially making Abscam an FBI HQ-authorized long-term undercover operation.

Meanwhile, in June 1978 Special Agent Fuller called Special Agent Gunnar Askeland, who was assigned to the Miami Field Office and who had been in the New York Field Office from 1970 until the end of 1977. Fuller told Askeland about the new undercover operation called Abscam and stated that the Abscam informant was a man named Mel Weinberg, who, although he lived in New York, spent much of his time in Florida. In fact, said Fuller, Weinberg was scheduled to meet an Abscam suspect named Joseph Meltzer in Florida.

Askeland then informed Fuller that Meltzer was helping Askeland in another investigation. Meltzer had contacted Askeland in May or early June and had told him that a particular county commissioner within the Miami Field Office's jurisdiction was corrupt. Because Askeland recently had attended an FBI interview of another person who had made criminal allegations about that same commissioner, Askeland had opened an investigative file and had asked Meltzer to provide information on the commissioner's allegedly corrupt activities.[15] Accordingly, Askeland asked Fuller to cancel the scheduled meeting between Weinberg and Meltzer, and Fuller agreed.

Fuller and Askeland finished their discussion by trying to ascertain how Weinberg and Meltzer had come into contact with each other. Ultimately, the special agents determined that the contact must have been made through Ron Sablosky, one of the organized crime figures Weinberg had brought into Abscam in its earliest days. Askeland knew that Meltzer and Sablosky were friends.

---

[13] Under Paragraph E of the Attorney General's Guidelines on FBI Undercover Operations promulgated in January 1981, almost all of the information described in the text above as having been omitted from the application for FBI HQ approval would be required. The principal item not required by the guidelines is a description of how and by whom the informant will be monitored, controlled, and supervised. The Select Committee recommends that the guidelines be amended to include such a requirement.

[14] The approval of Director William H. Webster was not required under any policy then existing, and it was not sought. Approval of the Director also would not be required under the current guidelines.

[15] As discussed at greater length at pp. 313-16 *supra*, the Select Committee has been unable to obtain substantial relevant information about Meltzer's involvement in Abscam, his relationship with Weinberg, and the basis for his use by the Miami Field Office. The Department of Justice has refused to provide documents or to answer questions pertaining to those matters, asserting that its refusal is necessary to avoid prejudice to its defense of the civil cases filed against it by persons claiming to have been injured by the FBI's failure to prevent Meltzer from defrauding them.

On May 22, 1978, Meltzer was sentenced in Florida to 30 months in federal prison. Nevertheless, within two weeks he was working with Special Agent Askeland and operating a Florida business called H & J Realty Company. Meltzer's relationship with the FBI centered on a political corruption investigation; Meltzer was talking by telephone with Weinberg in that period; Weinberg was working with Meltzer's contact agent, Gunnar Askeland; but the FBI claims that Abscam did not focus on political corruption until November 16, 1978.

The Department's refusal to assist the Select Committee in resolving these and related matters sharply illustrates the problem with the Department of Justice's argument that legislation governing undercover operations is unwise and that congressional oversight can ensure that undercover operations are properly conducted. Effective oversight requires information on a timely and forthright basis.

Later in June, Askeland told Special Agent McCarthy about Meltzer's work for the FBI in Florida, told McCarthy that the operation was called Palmscam, and asked him to write a letter to Meltzer from John McCloud (McCarthy's Abscam alias) to help establish Meltzer's cover as a real estate expert. McCarthy sent the letter on July 7, 1978, on Abdul Enterprises stationery, to Meltzer at H & J Realty. The letter expressed McCloud's interest in buying two pieces of real estate and stated, "I feel confident, Mr. Meltzer, that you will be able to handle the legal problems concerning the use of the land in an appropriate way."[16] The letter did not state or suggest that Meltzer was or had been an employee, officer, or director of Abdul Enterprises; rather, its language plainly showed Meltzer to have been an H & J Realty employee being used by Abdul Enterprises as a real estate consultant.

In June 1978, shortly after Special Agent Fuller had called to tell him about the creation of Abscam and about the role of Weinberg in that operation, Special Agent Askeland met Weinberg in the West Palm Beach Resident Agency and discussed with him the manner in which they might work together on Abscam and other possible operations. Immediately thereafter, Askeland became Weinberg's contact agent in Florida and remained as such until early 1979.

On July 9, 1978, with Weinberg's help, the FBI recovered from Frank Kelly and Joseph Gennetti fraudulent gold futures worth $25 million and fraudulent certificates of deposit worth $10 million. On July 22, 1978, again with Weinberg's help, the FBI recovered from Kelly, Joseph Contorci, and Samuel Battaglia $19 million worth of phony gold certificates.[17] The recoveries on both dates occurred in Florida and arose out of meetings arranged by Weinberg between Abscam Special Agent McCarthy and Kelly and Gennetti.

The first Abscam conversations recorded after May 1, 1978, and the first after FBI HQ approved the operation, occurred on September 12, 1978. The recordings were of meetings held at the Abdul Enterprises office in Holbrook, New York, by Special Agents Fuller and McCarthy with various suspects introduced by Weinberg, including Herman Weiss, Sol Stitch, and Harry Sokoloff.

On September 13, 1978, Weinberg had a recorded conversation with Herman Weiss at the Abdul Enterprises Office. Weiss lived in Florida and was employed by H & J Realty, the Palmscam front company run by Joseph Meltzer. During that conversation Weinberg and Weiss discussed the real estate to which Special Agent McCarthy had referred in his July 7, 1978, letter to Meltzer. Weinberg told Weiss that Meltzer had said that he knew of a corrupt zoning commissioner who could be induced to change zoning boundaries to help Abdul Enterprises with respect to property in Florida it was thinking of buying. Weiss said that Meltzer had made the same statement to him. Weiss also said that Meltzer had stated that he "was taking over" the property and had offered Weiss a marketing job in connection with it. Weinberg responded that Meltzer was not taking over the property, did not even represent Abdul Enterprises, and would not be a partner. Weinberg emphasized that his Arab client would not take anyone as a partner, except possibly a politician who had to be paid off to make the transaction possible. This was the first recorded Abscam conversation in which an interest in bribing public officials was discussed.[18]

Weinberg and Weiss also discussed Abdul Enterprises' finances. In the course of that discussion, Weinberg told Weiss that Abdul Enterprises had $400 million on deposit in the Chase Manhattan Bank in New York. He also told Weiss the position, although not the name, of the person who could be contacted at the bank by anyone who wanted to verify the company's financial status.[19]

---

[16] This description of events, confirmed by the letter itself, appears to conflict with the version given to the Select Committee by Special Agent Askeland. Askeland stated that Palmscam did not commence until August 1, 1978, and that H & J Realty, the front for Palmscam, was established on that date; but that date is three weeks after McCarthy wrote to Meltzer at H & J Realty. Because the Department of Justice has refused to provide the Select Committee with documents and information pertaining to Palmscam, the Select Committee cannot resolve the apparent conflict.

[17] On October 24, 1978, FBI HQ approved a lump sum payment of $5,000 to Weinberg for his services and expenses in connection with this transaction. The Assistant Director in Charge of the New York Field Office had requested the payment on October 2, 1978, in a memorandum describing Abscam's "primary mission" as "the recovery of stolen property particularly stocks, bonds, treasury notes and fictitious certificates of deposit."

[18] The FBI closed Meltzer as an informant on August 22, 1978. Because of the Department of Justice's refusal to provide information regarding Meltzer, the Select Committee has been unable to determine the basis for that action. *See* pp. 313-16 *supra*.

[19] Since Weiss and Meltzer worked together and were close friends, it appears that it was from this conversation that Meltzer eventually learned the identify of the Chase Manhattan officer who later verified the existence of the Abdul Enterprises account to inquirers.

During the same period, the FBI's Miami Field Office began another undercover operation, known as Goldcon, that to a significant extent overlapped with Abscam. The FBI refers to Goldcon as an "umbrella operation," because it had many different targets from its inception: advance fee swindles; fraudulent offshore banks; stolen and counterfeit stocks; stolen art objects and jewelry; thefts from Miami docks; shipment of stolen heavy equipment to South America; laundering of drug money and of organized crime profits; shipment of illegal guns to South America; narcotics; and political corruption. ([Deleted]) From the time Goldcon commenced [20] until Abscam ended in February 1980, Weinberg engaged in activities in Florida for both Abscam and Goldcon. With few exceptions, Senior Surpervisor Good and Special Agents Amoroso, Askeland, Fuller, and McCarthy could provide the Select Committee with no test for determining whether particular incidents were Abscam incidents or Goldcon incidents. Many FBI documents from that period refer in their headings to both operations; for example, on September 28, 1978, the Miami Field Office told FBI HQ, without identifying an operation, that it was investigating a "major figure in a suspected political corruption scheme." ([Deleted])

On September 26, 1978, Weinberg and Special Agent Askeland, acting in an undercover role, met with the mayor of a Florida city regarding the possible sale of a theater. The parties discussed payment of a $1 million kickback to be paid to the mayor through his secretary. ([Deleted]) This was the second documented instance in which Weinberg participated in a meeting with suspects in which political corruption was proposed.

In October 1978 the Abscam and Goldcon operations resulted in the FBI's recovery of several sets of fraudulent securities.[21] On October 4, at LaGuardia Airport in New York, Weinberg met with William Bell, Jack Morris, Edward Linnick, and Donald Eacret and purchased $200 million in fraudulent certificates of deposit. Pursuant to their prior arrangments with Weinberg, FBI special agents immediately entered the room and arrested everyone (including Weinberg, to conceal his cooperation with the FBI).[22]

On October 6, at the Abdul Enterprises offices, Weinberg met Daniel Minsky and William Rosenberg for the first time.[23] They discussed a proposal that Minsky and Rosenberg provide fraudulent certificates of deposit for Weinberg to use to help his employers, the sheiks, get money out of Arabian banks and into the United States. Weinberg told the two men that, if they were to provide $300 million in phony securities, he would pay them a seven per cent commission and would lend them half of the $300 million, at a reasonable interest rate, for various business ventures. When the matter of investments in Atlantic City arose, Weinberg said that Abdul Enterprises would provide support "if you can show me that you got the juice . . ., you know the right people." This was the third documented conversation in which Weinberg expressed an interest in finding corrupt public figures.

On October 24 Weinberg received $200 million in fraudulent certificates of deposit from Ben Cohen, Matthew Renda, and Saul Cooper.[24] On October 30 Weinberg received from William Rosenberg $300 million in phony certificates of deposit and $300 million in phony letters of credit.[25]

On November 20, 1978, Abscam and Goldcon yielded three more recoveries of fraudulent securities. Tony Costanza provided $300,000 in cashier's checks. George Cannon provided $300 million in phony certificates of deposit.[26] William Rosenberg provided another package of $300 million in phony certificates of deposit and $300 million in phony letters of credit.[27] These were the last illegal securities transactions in Abscam or in Goldcon in 1978.

---

[20] Goldcon did not receive formal FBI HQ approval until January 10, 1979, but the operation began on an SAC-approved basis in early September 1978 or in August 1978.

[21] This incident is a good example of the Abscam-Goldcon confusion. The New York Field Office claimed the incident as an Abscam incident and sought and obtained a bonus for Weinberg on that basis. The bonus request was sent on October 17. One day later the Miami Field Office sought FBI HQ approval of the Goldcon operation and listed this incident in a manner that made it appear as one of the early successes of Goldcon.

[22] On November 3, 1978, FBI HQ approved a $2,000 lump-sum payment to Weinberg for his services in connection with this transaction. The prosecution against Bell, Morris, Linnick, and Eacret was still pending in South Carolina when this report was filed.

[23] An FBI document prepared in early 1979 informed the Director that in July 1978 Minsky met Weinberg and offered to sell him phony certificates of deposit and that Rosenberg met Weinberg one week later and finalized the deal. ([Deleted]) The tape of the October 6, 1978, meeting belies that story, as does the testimony of Weinberg and Rosenberg.

[24] The prosecution against Renda and Cooper was still pending in South Carolina when this report was filed. Cohen is deceased. On October 27, 1978, the Miami Field Office requested a $2,000 lump-sum payment for Weinberg for his services in the Cohen transaction. The request was approved.

[25] This transaction is discussed at length at pp. 155–63 *supra*.

[26] Costanza and Cannon were not prosecuted for these transactions.

John Jacobs, the Strike Force attorney assigned to Abscam in 1978, told the Select Committee that, during October and November of that year, he and Supervisor John Good were devoting only a fraction of their time to Abscam. They were also investigating political corruption and organized crime activity pertaining to the Southwest Sewer District in Suffolk County, New York. Because they knew Weinberg had organized crime contacts in that region, Jacobs and Good talked to him on several occasions about the investigation and solicited his help.

Also during the fall of 1978, Weinberg continued to contact various individuals to discuss possible illegal transactions. During those two months, for example, he had recorded conversations with Herman Weiss about securities and about Las Vegas hotels; with Robert Edwards about securities and real estate transactions; with Ron Sablosky about securities and art; with Mel Rappaport about pornography and a uranium conspiracy; with Bruce Tingle and Don Eden about phony securities, art, and Las Vegas gambling; with Harry Sokoloff about art and securities; with Sam Goldstein about Las Vegas property and a garment industry transaction; and with the several figures who produced fraudulent securities during that period, such as Rosenberg, Renda, and Bell.

One of the individuals who contacted Weinberg during this period was John Stowe. After having met with Weinberg and McCarthy on September 12 and 13, Herman Weiss had contacted a Florida "business broker" named Nola Skyler to ask if she knew anyone who needed financial backing. Skyler, who had met Stowe about two years earlier and knew that Stowe was looking for a business loan, had told Stowe to contact Weiss. (*See Jenrette* Trial Tr. 3861-67.) On September 17 Stowe contacted Weiss.

On October 10 Stowe called Weinberg at Abdul Enterprises. It was the first of many conversations they had, many of which were recorded. Most of the recorded conversations pertained to possible financing for a business venture proposed by Stowe and to the possibility of Stowe's procurement of illegal securities. In a recorded conversation on October 17, 1978, Stowe stated that he might be able to get bank documents from Switzerland with help from "a Congressman friend" whom Stowe described as being "as big a crook as I am."

On November 16, 1978, Weinberg and McCloud (Special Agent McCarthy) met with Rosenberg, who had already provided some fraudulent securities, and his partner William Eden at the Abdul Enterprises offices. As the meeting began, Weinberg introduced Eden and Rosenberg to McCloud and stated, "These are the gentlemen I spoke to you about that * * * have the politicians."[28] Eden then described at length several corrupt dealings he had recently had with Angelo Errichetti, Mayor of Camden, New Jersey, and with a man named [deleted],[29] who negotiated business transactions for the State of New Jersey. Eden said that in each of the transactions he had paid kickbacks directly or indirectly to public officials. He also said that Mayor Errichetti had several more projects to offer, including "a package for a hotel in Atlantic City," and that "the mayor has got a tremendous amount of juice in Atlantic City." After the group discussed several possible investments unrelated to Mayor Errichetti or Atlantic City, Weinberg suggested that Eden and Rosenberg arrange a meeting between Mayor Errichetti and McCloud. They agreed, and the meeting ended.

On December 1, 1978, Eden and Rosenberg introduced Errichetti to McCloud and Weinberg at the Abdul Enterprises offices. The group discussed the possibility of Abdul Enterprises' opening a hotel in Atlantic City. When Weinberg asked Mayor Errichetti "how much we are talking dollars and cents it's gonna cost for you to take care of all of this," Errichetti said, "Whatever you two * * * I don't want to discuss it. * * * You talk to these gentlemen." After further discussion about Atlantic City and Camden, McCloud agreed to go to Camden to meet with Errichetti during the following week.

Errichetti then left the room, and Eden told Weinberg and McCloud that Errichetti would have to be paid between $350,000 and $400,000 for his help in Atlantic City and that Errichetti would "do the distribution" without telling them who was being paid. Eden also said that Errichetti did not want to go to the Abdul Enterprises offices again and did not want McCloud to hand him the money personally. After briefly leaving the room, Eden returned, indicated that he had talked to Errichetti in the next room, and proposed that, when the time for the payoff arrived, McCloud could give the money in a distinctive, colored envelope to Eden, who would then walk over to Errichetti's car, in McCloud's view, and hand the envelope to Errichetti. Eden said that Errichetti would accept that method of payment; that, when Eden had left the room, he had told Errichetti that the down payment on the payoff would probably be $50,000; and that Errichetti did not "make any big fuss * * * He's looking to play ball." [30]

---

[27] This transaction is discussed at length at pp. 155-63 *supra*.

[28] This is the first Abscam document indicating that Weinberg had talked to Special Agent McCarthy about corrupt politicians, although, as noted earlier in this report, Weinberg was clearly involved with political corruption matters in prior months.

[29] The omission of sensitive information is identified by "[deleted]." *See* pp. V-VI *supra*.

The meeting between McCarthy and Errichetti arranged for the following week did not occur, because McCarthy's father-in-law died on December 4. Moreover, because he had primary responsibility for Abscam's day-to-day activities and for supervision of Weinberg, and because of the combination of his family obligations and the impending holidays, McCarthy decided to shut down all Abscam activities until the beginning of 1979. At about the same time, Special Agent Fuller ceased active participation in the Abscam operation, as he turned his attention to other investigations.

Nevertheless, on December 20, 1978, Weinberg met with Eden, Minsky, and Rosenberg on Long Island and discussed their backgrounds and McCloud's background. They then agreed that Abdul Enterprises principals would meet with others in Atlantic City on January 8, 1979.[31] (*See Kelly* Def. Trial Ex. 17.) On the same date the New York Field Office requested in writing that the Newark, New Jersey, Field Office conduct a full background search on Mayor Errichetti, especially regarding connections with organized crime figures, and on Eden and Minsky. A similar search on William Rosenberg had already been conducted.

Thus, as 1978 drew to a close, Abscam had yielded contacts with several underworld figures, the recovery of many fraudulent securities, and some information about organized crime activities. In addition, it had made several efforts to identify corrupt public officials, and it stood poised on the threshold of its first payoff to a public official, Mayor Angelo Errichetti. Abscam had FBI HQ approval to operate until January 25, 1979,[32] and to spend up to $40,000.[33]

It appears that, throughout Abscam's operation in 1978, Weinberg was under instructions from the FBI to record all conversations regarding illegal activities. Special Agent Askeland so testified, and he also testified that he had expressly told Weinberg not to record conversations about personal matters or about legitimate activities. (*Jenrette* Trial Tr. 4114-17, 4170-72.) Askeland believed that, because Weinberg had spent many years "on the street," Weinberg knew what was legitimate and what was illegitimate. (*Id.* at 4173-76A.) Similarly, Special Agent McCarthy told the Select Committee that he had told Weinberg to record "everything of interest to the FBI, whenever feasible." Weinberg himself testified that he had been instructed to tape "wherever it was possible" (Sel. Comm. Hrg., Sept. 16, 1982, at 159 (testimony of Melvin C. Weinberg)); but he also inconsistently testified that he was told to tape only "what was important" (*id.* at 164).

From July 25, 1978, when FBI HQ notified the New York Field Office that Abscam had been approved as an undercover operation, until the end of that year, 45 recording tapes were produced in Abscam, approximately 20 of which recorded more than one conversation. Telephone toll records obtained by the FBI many months later show twelve unrecorded conversations between Stowe and Weinberg in November and December [34] and numerous unrecorded conversations between Weinberg and other suspects during the same period. Three of the unrecorded Stowe calls and numerous conversations with other suspects were made to or from the FBI's Abdul Enterprises offices, and Weinberg himself made two of the unrecorded Stowe calls. No explanation has been given as to why calls made to and from the

---

[30] When the FBI interviewed Eden on January 16, 1981, he confirmed that on December 1, 1979, Errichetti had told him that a $400,000 payoff would be required.

[31] On the same day, a New York SAC sent the Newark SAC an airtel stating that Eden had called Abdul Enterprises to cancel the scheduled December 21, 1978, tour of Camden and Atlantic City "for the time being."

[32] On October 12, 1978, however, the New York Field Office had informed FBI HQ of its expectation that Abscam would terminate its covert phase in ten months. ([Deleted]) Clearly, the New York Field Office expected that FBI HQ would extend approval of the operation at least into 1979.

[33] On October 5, 1979, FBI HQ approved the New York Field Office's request to increase the funding from $30,000 to $40,000.

[34] The toll records show four additional unrecorded conversations between Stowe and Weinberg from January to April of 1979. The FBI's recordkeeping practices and failures in evidence management throughout Abscam are extensively discussed at pp. 83-111 *supra*.

FBI's own business front and calls made by the informant to a suspect were not recorded.

Just as Weinberg had instructions to record conversations, the FBI special agents assigned to Abscam had instructions to prepare a written report, on an FBI form called an FD 302, of every unrecorded conversation containing information that could be used as testimony in a subsequent judicial or quasi-judicial proceeding or that could assist a prosecutor in evaluating a case. From July 25, 1978, when Abscam received formal FBI HQ approval, to the end of the year, Special Agent McCarthy, who had primary responsibility for supervising Weinberg in that period, filed fewer than ten such reports. Special Agent Askeland, who had responsibility for supervising Weinberg in Goldcon and in Abscam activities in Florida, filed 28 such reports from September 20 to October 20, 1978, but apparently filed none during the remainder of the period from July 25 to December 31, 1978.

JANUARY 1979

On January 3, 1979, a meeting was held in Camden, New Jersey, to discuss the bid by the cities of Camden and Philadelphia to obtain a contract to rehabilitate the carrier *Saratoga*. Among the participants were Errichetti and Harrison A. Williams, Jr., New Jersey's senior United States Senator. (*Wms.* Trial Tr. 4226–29.) At some point during that meeting, Senator Williams and Errichetti, who knew each other from prior occasions, had a private conversation in which Errichetti told Senator Williams that financial advisors to the Kennedy family and representatives of wealthy Arabs shared a common investment advisory team. This team, said Errichetti, was considering investing in the Camden area and might be a good source of financing for anyone known by Senator Williams to need financial backing. Senator Williams stated that he had friends with such a need, and he asked if one of them, Alexander Feinberg, could call Errichetti. Errichetti consented. (*Wms.* Trial Tr. 4229–34.)

On January 5, 1979, FBI Senior Supervisor John Good notified FBI HQ that Special Agent Anthony Amoroso, who was en route to a new assignment in the Miami Field Office, was to be assigned on a temporary basis to the New York Field Office's Abscam operation. Good stated that Amoroso would fly to New York on January 8 to meet the Abscam operatives. Good also noted that Abscam was "currently targeting [a] New Jersey political figure"; presumably, this referred to Errichetti. ([Deleted])

Amoroso informed the Select Committee that in December 1978 the FBI had transferred him from FBI HQ, where he had been a supervisor throughout 1978, to a new assignment in the Miami Field Office, where he had been before his FBI HQ assignment. Immediately upon arriving in Miami, he was assigned to the Goldcon undercover operation. Sometime in December he received a call from Good, with whom he had worked during his six-year stint in the New York Field Office, in which Good asked him to work on Abscam. Good explained that Mel Weinberg was an informant in Abscam and Goldcon and that both cases had activities in Florida, where Weinberg spent about half of his time.

Amoroso agreed to work on Abscam on a temporary basis until he could determine whether he and Weinberg could work together; from his prior undercover experiences, Amoroso had concluded that one of the most important criteria for success in an undercover operation was a good working relationship between the principal undercover agent and the informant. Good told the Select Committee that he was anxious to get Amoroso, because Abscam was McCarthy's first undercover assignment and Weinberg had complained about McCarthy's inexperience.

Amoroso assumed the name Tony DeVito as his undercover name for Abscam and Goldcon. At first he was characterized as the sheik's construction engineer. He did not want to appear to be an important person in Abdul Enterprises until he decided that he could work with Weinberg and would continue in the operation. To make his "promotion" to a position of importance easier if he should decide to stay, he also claimed to represent another sheik, one located in Florida.

Errichetti testified to the Select Committee that on January 6, 1979, he and Joseph DiLorenzo, his nephew, had driven from New Jersey to the parking lot of the Blue Dawn Diner in Hauppauge, New York, to meet with Weinberg for the first time since December 1, 1978. Errichetti claims that Weinberg had called him to arrange the meeting, saying that it was important for them to talk, and not over the telephone. When they arrived at the parking lot, Errichetti left DiLorenzo and went to Weinberg's car. The two men met for only approximately 15 minutes and discussed meetings that had been planned for the following week in Atlantic City. Weinberg explained that he and Tony DeVito, whom Weinberg respected a good deal, were working out a scheme to supplant McCarthy in the Abdul Enterprises hierarchy. Errichetti was assigned a role to play: He would be their ally, with the "abilities to move mountains, to get things done," which would enable them to impress their employer. Weinberg also proposed that Errichetti be a confederate of his and DeVito's in a scheme to defraud the sheik as opportunities arose. (Sel. Comm. Hrg., Sept. 15, 1982, at 31-36 (testimony of Angelo J. Errichetti).)

The Select Committee finds, however, that Errichetti's entire story about the alleged meeting on January 6, 1979, is false. First, it is highly unlikely that Errichetti and his nephew would make a five-hour round-trip road trip on a snowy day (as Errichetti and DiLorenzo contend it was) for a 15-minute meeting in a parking lot with a man Errichetti had met only once. The improbability is made even greater by Errichetti's later contention that, when Weinberg telephoned to ask him to make the trip, Weinberg did not tell him what they were going to discuss. Errichetti admitted that he did not know how it was going to benefit him personally. (*Id.* at 33.)

Second, Errichetti testified that Weinberg telephoned him several times between December 1, 1978, and January 6, 1979, to "indoctrinate" him, to "downgrade" McCloud, to "establish his credibility," and to induce Errichetti to "become his comrade." (*Id.* at 28-32.) The Select Committee, however, has examined all of the telephone toll records for all calls made from Weinberg's residences in New York and in Florida and from the Abdul Enterprises offices, and for all calls charged to Weinberg's telephone credit card; no call to Errichetti's homes or offices or to Errichetti's secretary's office was made from any of those locations or charged to Weinberg's credit card between December 1, 1978, and January 17, 1979.

One might think that Weinberg could have placed the alleged calls from pay telephones to avoid having the FBI learn of the calls. But that makes no sense, either, because Errichetti described nothing in the alleged conversations that would have caused significant problems for Weinberg; further, if Weinberg made several calls from pay telephones before January 6, there is no reason he could not have made one more call from a pay telephone on January 6, rather than making Errichetti drive for five hours in the snow for a 15-minute conversation; further, in numerous hours of taped conversations in 1979, either between Errichetti and Weinberg or among Errichetti, Weinberg, and DeVito, Errichetti never referred to any "indoctrination" conversation with Weinberg before January 8, 1979.

Third, Errichetti testified that, at the January 6 meeting, Weinberg talked at some length about Tony DeVito, "who he had a great deal of respect for at that time" and who was conspiring with Weinberg to defraud the sheik and to "get rid of McCloud." (*Id.* at 34-38.) In fact, however, as Good's January 5 report suggests, and as Amoroso and Weinberg have confirmed, Weinberg had not even met DeVito (Amoroso) as of January 6, 1979. Moreover, if, as Errichetti seems to have been suggesting, Weinberg made his surreptitious telephone calls and held his clandestine January 6 meeting to prevent the FBI from learning that he was undermining McCarthy, it would have made no sense for Weinberg then to have told Errichetti that DeVito was a trusted comrade in the scheme in which Weinberg wanted Errichetti to participate; Errichetti would be sure to talk to DeVito about the scheme eventually, and Weinberg's conduct would thereby be discoverd.

On January 8, 1979, Weinberg met with Errichetti, Rosenberg, and Eden in Atlantic City, New Jersey, and discussed possible payoffs to members of the New Jersey Casino Control Commission in order to ensure a gambling license for Abdul Enterprises in Atlantic City.[35] Errichetti initially sought a downpayment of $50,000, but agreed before the meeting ended to a reduced downpayment of $25,000. In addition, they again discussed the payoff procedure that had been discussed on December 1, 1978: having a distinctly colored envelope containing the cash handed to Errichetti in a car, with McCloud observing from a distance. (*See id.* at 40-45.)[36]

---

[35] The meeting for January 8, 1979, had been arranged in a meeting of Weinberg, Minsky, Eden, and Rosenberg on December 20, 1978. (*See Kelly* Def. Trial Ex. 17.)

[36] On January 8, 1979, Special Agent McCarthy prepared a report describing the meeting outlined in the text above and stating that Rosenberg and Eden were at the meeting. On April 4, 1979, the New York Field Office sent to FBI HQ a report describing recent events in Abscam. The report states that on January 8, 1979, Weinberg met with Errichetti, Rosenberg, and Eden and discussed a $25,000 payoff for Errichetti. Errichetti testified to the Select Committee that he had met with Weinberg, Rosenberg, and Eden and that he also had met privately with Weinberg in the evening on January 8. Specifically, Errichetti claimed that he had met Weinberg alone in the Holiday Inn from five or six o'clock in the evening until eleven at night. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 48-49 (testimony of Angelo J. Errichetti).)

On June 10, 1980, Joseph DiLorenzo, Errichetti's nephew, told the FBI and Assistant United States Attorneys Edward J. Plaza and Robert A. Weir, Jr., that he and Errichetti had met Wein-

Continued

On the following day, Abdul Enterprises' Chairman of the Board, Jack McCloud (Special Agent McCarthy), arrived in Atlantic City with his party, including Tony DeVito (Special Agent Amoroso) and Margo Kennedy (Special Agent Margot Denedy), who was presented as a female companion to the sheik and a member of the Kennedy clan. (*See Wms.* Trial Tr. 1231.) Also present were William Eden and William Rosenberg.

Two meetings between Errichetti and Abdul Enterprises personnel occurred that day. In one of them, Weinberg met alone with Errichetti and did not tape the conversation. He later described the conversation to McCarthy, who reported it in an FD 302. According to the second-hand account, Errichetti talked about the crane lease-back deal that had been mentioned on December 1, 1978. Errichetti also told Weinberg that he was in touch with someone named "Frankie" who could print fraudulent certificates of deposit and counterfeit money and who had access to stolen paintings, jewelry, and securities. Weinberg expressed interest. ([Deleted])

In the other meeting McCarthy talked with Errichetti and recorded their conversation. At the beginning of the conversation, McCarthy was introduced to Tony Torcasio, who was the manager of the Holiday Inn in Atlantic City and who had agreed to manage a casino for Bob Guccione, publisher of *Penthouse* magazine, if Guccione could obtain financial backing for a casino. [Deleted.] After Torcasio left, Errichetti said that he wanted $25,000 immediately and $400,000 altogether to guarantee a casino license. He assured McCarthy that, as long as the Casino Control Commission's criteria were met, he could guarantee the license. He promised a full refund if the license were not granted and reminded McCarthy of his influence as a mayor and as a state senator, focusing on his control of the Planning Board, of other state senators, and of members of the Casino Control Commission. He claimed that three of the five commissioners—the chairman, a black woman, and Kenneth MacDonald, the vice chairman—were his "nominees." ([Deleted])[37]

Errichetti said that McCarthy was too late under all normal circumstances to receive a license, because at least twelve applicants were ahead of Abdul Enterprises. He nevertheless assured McCarthy that, with his, Errichetti's, help, the license could be procured.

On January 10 the Abdul Enterprises group, Eden, Rosenberg, and Errichetti, went to Cherry Hill, New Jersey, a suburb of Camden, to inspect the port. Later, at the Cherry Hill Hyatt House, Errichetti mentioned to McCarthy that on the following day he would introduce McCarthy to Alexander Feinberg and Sandy Williams to enable them to discuss their financial proposal concerning a mining project in Virginia. ([Deleted])[38] Errichetti identified Feinberg as an attorney who was Senator Harrison Williams' "bagman." ([Deleted])

On January 11 Errichetti introduced Feinberg and Sandy Williams to McCarthy. Feinberg described himself as a very close friend and political ally of Senator Williams. Feinberg told McCarthy that Senator Williams was very interested in having Sandy Williams and Feinberg's project funded and would cooperate in any way to attain that end. ([Deleted]) Feinberg and Sandy Williams agreed to supply more particulars about the proposal to aid the Abdul Enterprises executives in assessing the investment package. (*See Wms.* Trial Tr. 616–18.)

Also on January 11, John Good sent a written request to FBI HQ for authority and funds to pay Errichetti $25,000 in connection with the Abdul Enterprises application for a casino license. The request noted that Thomas Puccio concurred in the request.

---

berg and Bruce Bradley (Special Agent Bruce Brady) at the Holiday Inn on January 8, 1979; that Bradley and DiLorenzo had eaten dinner together at one location while Errichetti and Weinberg had eaten together at another location; and that he, DiLorenzo, had spent the night at Errichetti's home. He did not mention any other meeting that night between Errichetti and Weinberg. (*See* Martin F. Houlihan FD 302, June 10, 1980, *reprinted in* 128 Cong. Rec. S 1508 (daily ed. Mar. 3, 1982).) Weinberg denied to the Select Committee that the had had any private meeting with Errichetti on January 8, 1979. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 54 (testimony of Melvin C. Weinberg).) On November 19, 1982, FBI officials informed the Select Committee that Special Agent Brady's recollection agrees with DiLorenzo's. An expense report filed by Brady for January 8 shows that he and DiLorenzo also spent time together in a casino. ([Deleted]) When Eden was interviewed by the FBI on January 16, 1981, he said that he and Rosenberg had ridden to Atlantic City with Weinberg in a chauffeured car on January 8, 1979, and later had had dinner with him, after a meeting with Errichetti. Thus, Errichetti's contention that he met alone with Weinberg appears to be false.

[37] The controversy surrounding this meeting is discussed extensively at pp. 243–46 *supra*.

[38] As discussed in detail at pp. 206–07 *supra*, McCarthy's contemporaneous written reports of the events of January 10–11, 1979, contain material errors as to dates of and participants in meetings.

On January 12, 1979, Good reported to FBI HQ that Abscam and Goldcon had to be coordinated, because Weinberg and Amoroso were "to be integral parts of both operations and are currently involved in operations with a common denominator." Therefore, Good said, he and McCarthy would go to the Miami Field Office on January 15 to meet Bob Fitzpatrick, the Special Agent in Charge of that office. ([Deleted]) Good also asked that FBI HQ send the FBI HQ case supervisors for Abscam and Goldcon. FBI HQ agreed and sent supervisor Richard Schwein to the meeting. ([Deleted]) By the time this coordinating meeting was held, Weinberg had been operating simultaneously in Abscam and Goldcon for at least four months.

On January 17 the FBI's Newark Field Office sent John Good a reply to his December 20, 1978, request for information on Errichetti. The reply showed that Errichetti had been investigated for kickbacks on a demolition contract in Camden and for bid-rigging. A New Jersey grand jury had indicted Errichetti in 1977 on the latter charge, but he ultimately had been acquitted in a jury trial. ([Deleted])

Telephone toll records show that Weinberg had two unrecorded telephone conversations with Errichetti on January 17. Errichetti has testified that in those conversations Weinberg gave him instructions for a meeting Errichetti would have with McCloud to receive a payoff. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 58–59 (testimony of Angelo J. Errichetti).) On the same day, McCarthy called Errichetti and suggested that Errichetti go to Abdul Enterprises' offices to receive the $25,000 they had discussed on January 9. They set the payoff for January 20, a Saturday, at 10:00 in the morning. There was no mention of the previous conversation with Weinberg. ([Deleted])

On January 18 the FBI Undercover Operations Review Committee met and granted the request for approval to pay Errichetti $25,000.

Errichetti arrived in Hauppauge on the evening of January 19 with his nephew, Joseph DiLorenzo. Errichetti and DiLorenzo spent the night at the Holiday Inn.[39] Before Errichetti arrived at Abdul Enterprises on Saturday morning, McCarthy placed $12,500 in each of two envelopes, both of which he then placed in a larger manila envelope, announcing his actions as he performed them for a hidden video camera. ([Deleted]; Sel. Comm. interview of John M. McCarthy, Sept. 2, 1982.) When Errichetti arrived, they chatted about the casino licensing procedures. Errichetti reassured McCloud (Special Agent McCarthy) of his influence, noting first that Kenneth MacDonald, whom he had discussed with McCloud on January 9, "is the key, really. He's number one." He reviewed his links to MacDonald and stated that one of MacDonald's close relatives, whom he identified, was "attached to organized crime." He added that MacDonald's wife had just died and that he, Errichetti, had attended her wake. The discussion then turned to the titanium mining proposal that had been advanced by Feinberg and Sandy Williams on January 11, and Errichetti said, "Senator Williams, Pete Williams, called, [and] was very very pleased at the way you handled your clients, Alex Feinberg and the other fellow." McCloud commented that they had received the data they had requested and that he believed Weinberg had been in touch with Sandy Williams. ([Deleted])

McCloud later stated, "This is the thing we agreed on. You know, this is the initial * * * [you] know, what you earn in the beginning, right?" Errichetti replied, "I'll do. You know, as far as anybody else is concerned, and I told you before, nobody knows nothing. * * * Number two, to implement this thing quickly, is Mel the guy I wanna call? I'd appreciate calling someone." ([Deleted]) McCarthy agreed that Weinberg could be Errichetti's contact. ([Deleted])

There are several versions of what happened after Errichetti left Abdul Enterprises with the envelope containing $25,000. Errichetti's version is that, pursuant to Weinberg's instructions the previous night, Errichetti and DiLorenzo drove to the Hauppauge Holiday Inn sometime around noon, whereupon Errichetti gave the envelope to DiLorenzo to put under the mattress of one of the beds in *their* hotel room. They then left without checking out. The plan was that Weinberg, to whom Errichetti had given one of the room keys the previous evening, would take the entire amount and put it into escrow until the time Errichetti left office and that Errichetti, Weinberg, and DeVito would then enter business together. (Sel. Comm. Hrg., Sept. 15, 1982, at 63–70 (testimony of Angelo J. Errichetti).)

---

[39] Errichetti claims that, pursuant to Weinberg's instructions, he checked in as Bill Eden. He further claims that he, Weinberg, and DiLorenzo dined together and then went to the room he and DiLorenzo were sharing, where Weinberg reviewed the scenario for the bribe payment to take place the next morning.

When DiLorenzo was interviewed by the FBI and federal prosecutors on June 10, 1980, however, he described the events of January 19, 1979, but omitted any mention of dinner with Weinberg. When the Select Committee specifically asked him if he and Errichetti had dined with Weinberg, he said he had no recollection of that fact. Weinberg denies that he spent more than a few minutes with Errichetti on January 19. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 55–56 (testimony of Melvin C. Weinberg).)

DiLorenzo, on the other hand, claims that Errichetti told him either to give the envelope to Weinberg or simply to put it in *Weinberg's* room. (*See* Martin F. Houlihan FD 302, June 10, 1980, *reprinted in* 128 Cong. Rec. S 1509 (daily ed. Mar. 3, 1982).) He does not recall having seen Weinberg or having placed the package under a mattress. (Sel. Comm. interview of Joseph DiLorenzo, Sept. 10, 1982.)

Weinberg has testified that, unbeknownst to Errichetti, he was at Abdul Enterprises headquarters during Errichetti's meeting with McCarthy. After Errichetti left Abdul Enterprises, Weinberg drove to the FBI's Hauppauge Resident Agency, where he spent the rest of the day with agents until he went home. He did not see Errichetti that day, and he never saw the money. (Sel. Comm. Hrg., Sept. 16, 1982, at 61–64 (testimony of Melvin C. Weinberg).)

Because of the substantial inconsistencies between Errichetti's and DiLorenzo's versions of the events of January 20, and for the several other reasons discussed at pages 131–38 *supra*, the Select Committee finds that Weinberg did not receive any of the money paid to Errichetti on that date.[40]

Weinberg's telephone toll records show that he called Errichetti at least twice during the next five days. None of the conversations was recorded. Weinberg contemporaneously told McCarthy that during one of the conversations Errichetti had acknowledged receipt of the $25,000 bribe and had said that Weinberg was entitled to a commission, which Weinberg had refused. Errichetti had reiterated that he could secure fraudulent certificates of deposit, and Weinberg had agreed to meet with him sometime to arrange for the production of such securities. ([Deleted])

Errichetti flew to West Palm Beach, Florida, on January 25. There are three conflicting accounts of what occurred. Weinberg claims that Errichetti telephoned him by surprise at some reasonable hour in the morning of January 26, that Weinberg then met Errichetti at the airport, that Errichetti gave him some fraudulent certificates of deposit to examine for the purpose of deciding whether to ask Errichetti to produce a large quantity, and that Weinberg gave the samples to Special Agent Askeland. ([Deleted]; Sel. Comm. Hrg., Sept. 16, 1982, at 215 (testimony of Melvin C. Weinberg).) Errichetti claims that Weinberg previously had asked him to visit on January 25, and he denies that he gave Weinberg a sample certificate of deposit. Both men agree that they spent the day together. (Sel. Comm. Hrg., Sept. 15, 1982, at 235–36 (testimony of Angelo J. Errichetti).)

The third version is that contained in a contemporaneous written report prepared by Special Agent Gunnar Askeland of the Miami Field Office. Askeland's report states that on January 26, 1979, Weinberg told him that at 3:00 a.m. that day Errichetti had called and had told Weinberg that it was urgent for them to meet. Weinberg had met Errichetti at 7:00 a.m. at room 608 of the Sheraton Inn in West Palm Beach, where Errichetti had given Weinberg a Chemsave certificate of deposit. ([Deleted]) When interviewed by the Select Committee, Askeland stated that his report accurately reflected what Weinberg had told him. FBI officials have confirmed that the Chemsave certificate of deposit given to Askeland by Weinberg on January 26, 1979, is still in the FBI's possession.[41]

Sometime in January 1979 an officer from the European-American Bank contacted Abdul Enterprises and scheduled a meeting for Weinberg to meet with Alfred Carpentier, a Long Island businessman, who was president of Beefalo Cattle & Land Company in upstate New York. A representative of the bank, an attorney named

---

[40] On November 18, 1982, the Select Committee asked the FBI to provide travel vouchers or other evidence showing when Weinberg left New York and arrived in Florida, because documents reviewed by the Select Committee showed that Weinberg was in New York in the early afternoon of January 20 and in Florida that night. On December 1, 1982, the FBI reported that it could find no documentary evidence showing when Weinberg left New York or arrived in Florida, but that several special agents who had monitored the Errichetti-McCloud meeting or were at the Hauppauge Resident Agency recalled having been with Weinberg until about 11:30 a.m. on January 20. The special agents were Brady, Coughlin, Distler, Good, Kaczmarek, and McCarthy.

[41] Pursuant to a Select Committee subpoena, the Sheraton Inn provided the Select Committee with original reservation, folio, and long-distance-call records for Errichetti showing that he stayed in Room 628 of that hotel on the nights of January 25 and January 26, 1979. The records also show that he checked in at 1:57 a.m. on January 26 and made the reservation on January 25 from New Jersey. The lateness of the reservation and of Errichetti's arrival tend, in the Select Committee's view, to support Weinberg's contention that Errichetti surprised him and to undermine Errichetti's contention that the trip was planned in advance with Weinberg. The error in Askeland's record, made that very day, of Errichetti's room number shows the frailty of evidence recorded by Abscam special agents relying upon the accuracy of Weinberg's memory and perception. (*See* pp. 167–69 *supra.*)

Boatman, and Carpentier met with Weinberg at the Bonwitt Inn in Commack, Long Island, later that month. The conversation was not recorded, and no FD 302 describing the meeting was ever prepared. Carpentier wanted to sell commercial paper relating to the company, a tax shelter interest in the company, or the company itself to Abdul Enterprises. On January 26, 1979, in West Palm Beach he gave to Weinberg fraudulent certificates of deposit, with a face value of $384 million, drawn on the First National Bank of Teheran. Weinberg gave the securities to Special Agent Askeland. Weinberg also reported that Carpentier had claimed to have had a politician "in his pocket."[42] ([Deleted]) The meeting at which Carpentier provided the securities was not recorded, and no FD 302 describing the meeting was ever prepared.

On January 29, a picture appeared in various newspapers, including *Newsday*, a Long Island newspaper, showing FBI special agents who had successfully foiled an attempted airplane hijacking on the previous day. Although her name was not given, Special Agent Margot Denedy, who had been working undercover in Abscam as Margo Kennedy, appeared in the picture.

FEBRUARY 1979

On February 5 Weinberg told Special Agent McCarthy that Rosenberg and Eden had telephoned him on January 31 and that Angelo Errichetti had called him later that same day. All three had informed him that they had seen the photograph, but he had convinced them that the woman in the photograph could not have been Kennedy, he claimed. He said that he had urged them to check with various individuals associated with organized crime who would verify that she was part of Abdul Enterprises, not an FBI agent. Weinberg further told McCarthy that he had contacted the individuals whom he had named as references and had asked them to vouch for her. (*See Kelly* Def. Trial Ex. 12.)

On February 7 Weinberg, DeVito (Amoroso), and Bradley (Brady) visited Errichetti in Atlantic City. (*See Kelly* Weisz Def. Trial Ex. 30.) Nothing was said about the incident, and nothing suggests that Errichetti had ever seen the photograph.[43] Amoroso told the Select Committee that at this meeting Weinberg gave Errichetti a Chemsave certificate of deposit for Errichetti to use in producing fraudulent certificates of deposit for Abdul Enterprises.

During a meeting at the Holbrook office of Abdul Enterprises on February 12, Errichetti spoke with DeVito and Weinberg about counterfeit money that Frank Pulini could manufacture.[44]

In passing, Weinberg observed that Atlantic City was still "wide open" for organized crime elements to intervene. Errichetti agreed, saying that the Bruno, Genovese, and Gambino "families" were already active. Later, Weinberg asked if Errichetti could determine whether Bob Guccione of *Penthouse* had criminal connections, and Errichetti promised to do so. ([Deleted])

Eventually, Weinberg and DeVito left as McCloud arrived to meet with Errichetti. Errichetti told McCloud he had spoken with MacDonald and cautioned McCloud that MacDonald was "not a crook." Even as he made these protestations, however,

---

[42] There is no recording of any conversation between Weinberg and Carpentier in which the plan for the securities is discussed or of the meeting at which Weinberg obtained the securities. Nor is there any FBI report describing the planning conversation or the meeting.

[43] As discussed in detail pp. 170–72 *supra*, the Select Committee concludes that Weinberg never had the alleged conversations with Errichetti, Rosenberg, and Eden about Denedy's picture; rather Weinberg fabricated the story in order to enhance his importance to the success of the operation and to obtain more compensation from the FBI. He succeeded. On February 16, 1979, the New York Field Office requested a $15,000 lump-sum payment to Weinberg, based in large part on the alleged Denedy incident. (*Kelly* Weisz Def. Trial Ex. 30.) FBI HQ acknowledged the effectiveness and ingenuity of Weinberg's purported actions to save the operation and approved a $5,000 lump-sum payment. (*Id.*)

Since then, Errichetti and Rosenberg have denied the alleged conversations; DiLorenzo has denied having heard his uncle speak of it; and numerous conversations with Errichetti, Eden, or Rosenberg have been taped, and no mention of the incident has ever been made by anyone. On December 17, 1980, February 16, 1981, and September 16, 1982, Weinberg admitted under oath that Errichetti had never discussed the Denedy picture with him. Weinberg claims that McCarthy erroneously reported what Weinberg told him on February 5, 1979.

[44] The transcript of the February 12 conversation contains several references to "paper," but it is unclear whether all of those references are to counterfeit money or whether some are to fraudulent securities. A teletype sent to FBI HQ on February 12 says, "It was understood by the participants of this conversation that the 'paper' referred to was counterfeit money." ([Deleted]) Special Agent Amoroso told the Select Committee, however, that both counterfeit money and fraudulent securities were discussed at that meeting. Errichetti confirmed that both topics were discussed sometime during that period.

Errichetti scribbled "$100,000" on a piece of paper, saying, "That's for four." McCloud replied, "That's for all four of you." Another scratching sound was recorded as Errichetti went on, "Ten down. Ten percent." After further discussion of the breakdown of the bribe, Errichetti told McCloud, "You couldn't hand them anything, 'cause that would be the end of it. I'm their bag guy. They're gonna deal with me. I'm gonna deal with you." McCarthy appeared receptive. Errichetti proceeded to invite McCarthy to have dinner with him and MacDonald in March, admonishing him that they should avoid any discussions of casinos.[45] ([Deleted])

In early February 1979, Weinberg and Amoroso discussed the informant's $1,000 monthly payment for services. Although expenses were paid separately, Weinberg considered the monthly payment insufficient. As a result, on February 9 the New York Field Office recommended a raise ([Deleted]), and on February 26 FBI HQ increased Weinberg's monthly stipend to $3,000. ([Deleted])

In late February 1979, Thomas Puccio, Chief of the Department of Justice Organized Crime Strike Force for the Eastern District of New York (also called the Brooklyn Strike Force), went to Washington, D.C., to talk with two of his superiors in the Department of Justice, David Margolis, Chief of the Organized Crime and Racketeering Section of the Criminal Division, and Philip B. Heymann, Assistant Attorney General, Criminal Division. Puccio reported to them that the Abscam investigation had become focused on political figures in New Jersey: Errichetti, MacDonald, and [deleted]. Communications from FBI special agents in New York to FBI HQ confirmed that news: FBI communications from New York had begun to describe Abscam as an investigation of "a major case of political corruption." ([Deleted]) On February 26 the Undercover Operations Review Committee approved additional funding of $50,000 for Abscam until September 30, 1979, describing the operation as an "investigation of political corruption, pay-offs and bribery in the political sector of mid-Atlantic coast" and of organized crime figures. ([Deleted])

Puccio wanted to retain exclusive control of the investigation, which was acceptable to David Margolis. Margolis was greatly impressed by Puccio's effectiveness and record as an investigator and prosecutor. Assistant Attorney General Heymann also concurred, but directed that Robert J. Del Tufo, United States Attorney for New Jersey, be apprised of the situation. (Sel. Comm. interview of David Margolis, Sept. 3, 1982.)

Accordingly, on February 28, at the FBI Field Office in Newark, Puccio met with Newark FBI special agents, Del Tufo, and Robert Stewart, Chief of the Department of Justice Organized Crime Strike Force for the District of New Jersey. Another meeting was scheduled for March 9, to be attended by Del Tufo, FBI personnel, and Strike Force personnel from New York and New Jersey. ([Deleted])

In late February Weinberg received a call from the Vice Chairman of the Garden State Racing Association, Edward Ellis.[46] Ellis was also part owner of the Garden State Raceway, which had burned down and which Ellis and his partner, William Hyman, hoped to rebuild. ([Deleted])

Ellis, Hyman, and Weinberg met in Florida in late February to discuss financing for rebuilding the racetrack.[47] Weinberg told the two men that Abdul Enterprises would consider the deal only if they could guarantee help from politicians. Ellis replied that he had a politician, Angelo Errichetti, who Weinberg said was acceptable.

MARCH 1979

On March 1 Ellis and Weinberg spoke by telephone. Weinberg, who recorded the conversation, asked Ellis if he had done his "homework." Ellis said that he had, but that Errichetti had vetoed Ellis' selection of the politician to help in the deal. Ellis said he had four other politicians and would tell Weinberg later which one would help. Weinberg and Ellis then planned a meeting between Ellis and McCloud. Weinberg told Ellis to tell McCloud the name of the politician and to say, "It's gonna cost a hundred thousand. * * * Ten thousand down, for the guy." ([Deleted]) He added that he wanted to speak with Ellis a half-hour before the McCloud meeting to make sure that Ellis had the story straight.

---

[45] A report to FBI HQ prepared the same day stated that Errichetti "said that MacDonald assured the four commission votes necessary for Abscam license" and that "it would cost Abscam $100,000 for all four committee members." ([Deleted]) This meeting is discussed at pp. 247–48 *supra*.

[46] Many of the circumstances surrounding the Ellis events have been the subject of conflicting testimony, and some of Abscam's most severe critics have pointed to those events as another example of Weinberg's nefarious schemes. For a full discussion of these issues, see pp. 285–306 *supra*.

[47] Weinberg testified that Amoroso also was present. (*See* Sel. Comm. Hrg., Sept. 16, 1982, at 35 (testimony of Melvin C. Weinberg).)

Later that day Ellis called Weinberg and revealed the name of his politician: Alex Feinberg. Ellis said that Feinberg had "been in this Garden State deal all along" and described Feinberg as Senator Williams' "man" and "boy." ([Deleted], *reprinted in* 128 Cong. Rec. S 1497-98 (daily ed. Mar. 3, 1982).)

On March 2 Weinberg told McCarthy he had met that evening with Errichetti, who had said that he "controlled" Ken MacDonald. He also promised that Frank Pulini would furnish samples of 40 million dollars in counterfeit money and that he, the mayor, could get 87 million dollars [sic] in fraudulent certificates of deposit. ([Deleted])

Ellis and McCloud met on March 5. Ellis recited the history of the racetrack and his plans for its future. He then stated, "I got all the politicians." Senator Williams was "the key man," he said, "and this Alex Feinberg is his attorney and his bagman. But he's pushing * * * the thing." McCloud asked, "Williams is?" Ellis replied affirmatively and added, "Errichetti's on my side * * *; he's with me a thousand percent." Ellis told McCloud that the requisite legislation had passed the state senate and that he had obtained the building permits. He needed only one more thing: to get the state legislature to guarantee the racetrack's debt service. Errichetti was going to see that it passed. ([Deleted])

Ellis asserted that Senator Williams already had cost him $100,000 and then stated, "Yeah, Alex is his bagman and ah, ten thousand bucks to getting, get Alex straightened out and that'll, that'll do it." McCloud inquired, "What does Williams have to do with it now?" Ellis responded, "Williams is back of all of 'em. And Errichetti." Because Ellis had claimed to have the permits and Errichetti supposedly was taking care of the legislation, McCloud asked, "What do you need Williams and * * * those guys for now?" Ellis said that he did not have a racing permit, that his financing was not assured, and that "Williams will push, will push the whole thing." ([Deleted])

That evening McCloud met with Errichetti and MacDonald for dinner at the Hyatt House in Cherry Hill, New Jersey.[48] They discussed the procedures for getting a license, the importance of the site, and the need to work with the Staff of the Commission. MacDonald also said that he was loyal to Errichetti. After dinner Errichetti accompanied McCloud to McCloud's room at the hotel. Errichetti expressed his view, and his pleasure, that MacDonald had spoken unguardedly. He also said that he had attempted to ascertain whether Bob Guccione had organized crime connections and that Guccione had sworn he was not connected with organized crime. The mayor speculated that the *Penthouse* publisher would have difficulty financing a casino and that without financing he could not get a license. ([Deleted]) At breakfast the next morning, McCloud asked Errichetti how the other commissioners would be "taken care of." Errichetti said that was MacDonald's business and that he, Errichetti, did not want to know. ([Deleted])

On March 8, DeVito and Weinberg met with Errichetti in Atlantic City. At first DeVito and Errichetti were alone, and Errichetti said, "The CDs [certificates of deposit] are all typed, stamped, you know, signature stamped, every fucking thing, and each one of them has been wiped with a pumice." DeVito said, "Mel said he told you to take the ball and throw that thing away." "That's fucking in the river," replied Errichetti. He noted that "the briefcase has been wiped clean" so that "you won't find a mark on that whole box, inside or outside," and stated, "There's eighty-seven of them, five million apiece, four hundred thirty-five million dollars." ([Deleted], *reprinted in* 128 Cong. Rec. S 1501 (daily ed. Mar. 3, 1982).)

At that point Weinberg arrived, followed by DiLorenzo, who had the briefcase containing 87 fraudulent certificates of deposit. Each certificate had a face value of five million dollars and was dated February 3, 1979, drawn on Chemical Bank, and made payable to Yassir Habib. ([Deleted])[49]

---

[48] This meeting is discussed in detail at p. 248 *supra*.

[49] This securities transaction is discussed in detail at pp. 163-66 *supra*. Errichetti's transparent attempt to induce the Select Committee erroneously to believe that Weinberg produced the securities in question constitutes one of several instances that led the Select Committee to conclude that Errichetti's uncorroborated testimony should not be relied upon to resolve any controverted factual issue. As shown above, his testimony on the securities transaction was self-contradictory, inconsistent with his own recorded statements in the first three months of 1979, and inconsistent with the contemporaneous documents. Moreover, having given one story under oath in his morning testimony before the Select Committee, and having been told during the lunch recess that his testimony conflicted with the documents, he returned in the afternoon and volunteered an entirely different story.

During the discussions just described, Feinberg was waiting downstairs to speak with DeVito, Weinberg, and Errichetti. Before Feinberg joined them, Weinberg told Errichetti that Ellis had told McCloud that Feinberg was Senator Williams' bagman and that Senator Williams was supporting the racetrack venture. Errichetti protested, "[Feinberg is] my front. He's Williams' bagman, that's true. * * * That's what I told Ellis to say * * * I tell Ellis what to do." ([Deleted], *reprinted in* 128 Cong. Rec. S 1501 (daily ed. Mar. 3, 1982).)[50] When Weinberg told him that, based on Ellis' statements, McCloud was ready to offer a $100,000 bribe, $10,000 down, and that McCloud hoped to give it directly to Senator Williams, Errichetti remonstrated, "You don't go handing money out to a U.S. Senator. I could probably hand it to Williams faster; then what the fuck do you need him for?" They all then agreed that Ellis had "oversold" McCloud on Senator Williams. ([Deleted], *reprinted in* 128 Cong. Rec. at S 1502 (daily ed. Mar. 3, 1982).)

Weinberg suggested that to satisfy McCloud Feinberg should accept the down payment and give it to Senator Williams. Errichetti inquired, "What about the balance?" Weinberg answered, "The balance we'll grab." ([Deleted], *reprinted in* 128 Cong. Rec. S 1502 (daily ed., Mar. 3, 1982).) DeVito attempted to persuade Errichetti that Senator Williams should receive at least part of the bribe funds.

Returning to the MacDonald matter, Errichetti insisted that McCloud should give the money to him and that he would give it to MacDonald out of McCloud's presence. Weinberg then said of the $10,000, "Well, then let you give it to him, and the balance we can always glom. I'd rather have the guy get his feet wet. He sees the money and he wants it." Errichetti disagreed: "No, believe it when I tell you: MacDonald isn't getting a fucking quarter. No way. I may buy him a cigar, a three dollar cigar; that's it, but there ain't no fucking way that McCloud is gonna give it to him. The deal's off." He laughed, and Weinberg said, "Well, we'll work on that." ([Deleted], *reprinted in* 128 Cong. Rec. S 1503 (daily ed. Mar. 3, 1982).)[51]

The three men then discussed who would run the corporation owning the planned casino. In that context Errichetti said that he would talk to MacDonald and tell him, "Ken, this is your star for your future."

Feinberg then entered. When Weinberg revealed that Ellis had told them that Senator Williams would take a bribe, Feinberg called Ellis a "moron * * * and an idiot. * * * He mentions Pete Williams and it's not fair to McCloud, your boss. I'm telling you I'll do what your boss wants to be done, but do it my way * * * or legitimate way." Feinberg maintained that Errichetti had ample clout to guarantee a racing license. He also said that Senator Williams "pulls me into" all of his business deals, "[b]ecause I look out for his interest." Errichetti eventually declared to Feinberg, "Now you're gonna go back to fucking McCloud with Pete Williams. * * * You and Pete Williams and me, three of us. We'll give him all the fucking strength then." ([Deleted], *reprinted in* 128 Cong. Rec. S 1504-05 (daily ed. Mar. 3, 1982).)

Errichetti, Feinberg, DeVito, and Weinberg then agreed that the titanium project took priority over the racetrack. Feinberg showed Weinberg material pertaining to the mine. Looking at the list of shareholders, Weinberg asked if Senator Williams had an interest, pointing out that the Senator's name was not listed. Feinberg replied that Senator Williams was "gonna have a piece of the mine," but that neither Senator Williams' name nor his own could "show." ([Deleted], *reprinted in* 128 Cong. Rec. S 1505 (daily ed. Mar. 3, 1982).)

After Errichetti and Feinberg left, Carpentier and his partner Ken Boklan arrived, having come from a conference with McCloud and Tom Bishop (Special Agent Tom McShane), an art expert, in which they had discussed potential investment for the sheik, including real estate development in Long Island and "warm" Old Masters paintings from Europe. ([Deleted]) Tony Torcasio arrived, briefly discussed Guccione's business, and departed.

Errichetti then returned. In a private conversation with DeVito and Weinberg, he cursed McCloud's determination to give a bribe to MacDonald personally, without an intermediary. He insisted that McCloud shoud not risk antagonizing MacDonald. He, Errichetti, "will buy MacDonald with fuckin' chicken feed for him. Well he will take it." Weinberg assured him that they would "straighten it out with Jack." ([Deleted])

Weinberg and DeVito met on March 9 with Torcasio and Anthony "Babe" Dinallo, a construction contractor who had contracted to build the Atlantic City casino for Guccione. Weinberg questioned the soundness of Guccione's financial backing.

---

[50] The conversation during the March 8 meeting regarding Ellis is discussed in detail at pp. 292-304 *supra.*

[51] Those aspects of the March 8 meeting regarding MacDonald are discussed at pp. 249-50 *supra. supra.*

He also maintained that he had proof of Guccione's "mob" contacts, but Torcasio and Dinallo denied that such contacts existed. Weinberg then speculated that Guccione would fail to obtain a gambling license. ([Deleted])[52]

In early March the FBI, at Weinberg's suggestion, agreed to hold a party aboard its yacht, *The Left Hand.* The party was co-hosted by Abscam and Goldcon and was billed as a party honoring Mayor Errichetti.[53] *The Left Hand* was a sixty-five foot ocean-going yacht previously seized by United States Customs agents in a drug raid. (*Jannotti* Pre-trial D.P. Tr. 5.146.) The captain and crew were FBI agents.

Amoroso had resided on the yacht during most of the time since January 1979, when he had begun working on Goldcon and Abscam. He rarely had traveled during those initial months, because he and other FBI agents had been cleaning the yacht at its mooring in Del Ray Beach, Florida.[54] (The yacht was moved to Ft. Lauderdale in May 1979.)

When Weinberg was in Florida during the same period, he lived in a trailer on Hutchison Island with a woman named Evelyn Dawn Knight, while his family remained in Central Islip, Long Island, very near the Hauppauge Resident Agency.[55]

Sometime before March 11, 1979, Weinberg surprised Special Agent Myron Fuller by calling him to arrange to fly to Florida with him on March 11. When they were on the airplane, Weinberg gave Fuller several blank certificates of deposit, drawn on various banks, and photocopies of two checks. Weinberg told Fuller that in November 1978 he had recovered from William Rosenberg several other certificates of deposit, which Weinberg did not give to Fuller. He also said that he had given Errichetti a blank Citibank certificate of deposit and a blank Chemical Bank certificate of deposit and that Errichetti had had additional copies printed and had given those to Weinberg. (*See* Myron Fuller FD 302, Mar. 11, 1979, *Myers* D.P. Ex. 85.)

Fuller told the Select Committee that Weinberg had said that he had had the securities at home since November 1978, but either had not had an opportunity to bring them in or had forgotten to do so. Fuller also told the Select Committee that, according to Weinberg, the blanks he had given Errichetti were from Rosenberg. (Sel. Comm. interview of Myron Fuller, Sept. 2, 1982.)[56]

On March 13 McCloud fulfilled a commitment to Sandy Williams and Feinberg by flying to Piney River, Virginia, to inspect the titanium mine they wanted to purchase. McCarthy was accompanied by Special Agent Woods as the pilot, Bruce Bradley (Special Agent Brady), Sandy Williams, and another investor, George Katz. (*Wms.* Trial Tr. 620.) No conversation during the entire trip was recorded, and none of the FBI agents prepared any FD 302.

On March 19 McCloud, Bradley, Ed Ellis, and his business associate Frank Acconey visited Garden State Racetrack. Ellis told the Abdul Enterprises representatives that he needed $25 million to complete the racetrack. McCarthy agreed to review the prospectus. ([Deleted])

Because Errichetti was participating in the planning of the March 23 yacht party in his honor, he sent his nephew Joseph DiLorenzo to Del Ray Beach, where the yacht was moored, several days early. At dinner with Weinberg and Gunnar Anderson (Special Agent Gunnar Askeland) on March 20, DiLorenzo said that Errichetti "owned" Kenneth MacDonald because MacDonald owed his position on the Casino Control Commission to Errichetti and had received other favors from him. ([Deleted])

---

[52] Weinberg's actions regarding Bob Guccione are discussed in detail at pp. 306–12 *supra.*

[53] The first FBI report of the plans for the party was on March 13, 1979. ([Deleted])

[54] The Select Committee suggests that it probably is an inefficient allocation of law enforcement resources for an experienced FBI Special Agent to be assigned for two months to clean and to repair a yacht, particularly at the outset of his involvement in a complex, sensitive undercover operation.

[55] In July Weinberg moved with his wife and son to Tequesta, Florida, where he bought a townhouse.

[56] On September 8, 1982, FBI personnel informed the Select Committee that the documents Weinberg had turned over to Fuller were photocopies, not originals. The Select Committee has been unable to determine (1) what became of the originals, (2) the relationship between these photocopies and the securities previously recovered from both Rosenberg and Errichetti, and (3) why Weinberg retained these when he turned over other securities in November to Special Agents Askeland and McCarthy. Weinberg testified before the Select Committee that, contrary to what Askeland contemporaneously reported and later told the Select Committee, he had not retained all the fraudulent securities since November; rather, he had obtained them gradually, and some had been sent to Florida. He merely compiled them all in March to give to Fuller. (Sel. Comm. Hrg., Sept. 16, 1982, at 208–09 (testimony of Melvin C. Weinberg).)

It is unclear whether Weinberg lied to Fuller, lied to the Select Committee, or lied to both. In any event, because he lived only a few miles from the Hauppauge Resident Agency during that period and went to that Resident Agency and Abdul Enterprises almost daily, his failure to give the securities to McCarthy or Good as he received them cannot be reasonably explained, much less justified. Nor can his decision to give the securities to Fuller, who had stopped working on Abscam in December, be reasonably explained or justified. Nor can his failure to tell Good, McCarthy, Askeland, and Amoroso that he had given the securities to Fuller be reasonably explained or justified.

For a complete discussion of this controversy, see pp. 110–11 *supra.*

On March 20 the FBI held a conference at Quantico, Virginia, to plan the March 23 party. Deputy Assistant Director Francis Mullen chaired the meeting, which was also attended by the SAC from the Newark, New Jersey, Field Office; an assistant SAC from the New York Field Office; FBI HQ Section Chief W. D. Gow; FBI HQ Unit Chief W. J. Riley; FBI HQ Supervisor Michael D. Wilson; John Good; and several other special agents. Entrapment and due process issues, including recent judicial decisions, were discussed. Robert Fitzpatrick, SAC of the Miami Field Office, was made responsible for overall coordination, and he, Good, and another agent were directed to have Strike Force attorney John Jacobs brief all special agents and informants who would attend the party on the entrapment doctrine. ([Deleted]) [57]

On the evening of March 22 Errichetti met with Weinberg and DeVito at Del Ray Beach. Errichetti proposed manufacturing counterfeit money, contingent upon approval by DeVito and Weinberg. He also asserted that he controlled Babe Dinallo, the builder affiliated with Guccione. When the conversation turned to the impending MacDonald pay-off, Weinberg expressed concern that MacDonald was not going to Florida for the party. Errichetti said that MacDonald was not angry, but Errichetti expressed annoyance that McCloud did not appear to appreciate the extent to which MacDonald had compromised himself during their dinner conversation on March 5. He mentioned in passing that he had called the Chairman of the Board of First Pennsylvania Dime Bank and had arranged for MacDonald's son to be admitted to the bank's management training program.

On the morning of March 23 Weinberg spoke with Boklan, Carpentier, and another Long Island business broker, Charlie White, in Boklan's room at the hotel in Del Ray Beach. They discussed various illicit investments, including the stolen art the others had told Weinberg they could obtain. Weinberg told them that the sheik wanted only stolen paintings, which he displayed in his private museum, each with a newspaper clipping describing its theft. ([Deleted])

Approximately 35 non-FBI guests attended the party later that day. ([Deleted]) Special Agent Richard Farhart, recruited for the occasion because he spoke Arabic, made a brief appearance as Sheik Yassir Habib. He presented Errichetti with a "ceremonial dagger." [58] Errichetti in return said that he would later present to the sheik a gold key to the City of Camden. Senator Williams and Alexander Feinberg were photographed with Sheik Habib.

After the ceremony, DeVito and Weinberg spoke privately with Errichetti. Errichetti first remarked that MacDonald was the key to the Casino Control Commission because the other members deferred to his greater business experience. MacDonald, he said, had been instrumental in securing at Errichetti's bidding the casino license for Resorts International. Errichetti explained that he had made the request of MacDonald as a favor to Ray Brown, Resorts International's lawyer, who had successfully defended Errichetti when he had been prosecuted for bid-rigging. ([Deleted]) Errichetti also criticized McCloud, stating that McCloud made him uneasy. DeVito and Weinberg recommended that Errichetti sit down with McCloud and try to work out their differences. ([Deleted])

Elsewhere on *The Left Hand*, Weinberg spoke with Senator Williams and Alex Feinberg. He explained the distinction between Yassir Habib's operation in Florida, managed by Tony DeVito, and Kambir Abdul Rahman's Abdul Enterprises in New York, where McCloud was chairman of the board. The three men then discussed the titanium venture. Weinberg started to voice concern about George Katz' reputation. Senator Williams laughed and stated that he knew "quite a bit about George," but did not know him well. He added, "[H]e is a nice guy, and he's a generous guy; and he, uh, he was in a business in a community, and he was doing business the way business is done in a community in that business. * * * I mean, nothing venal." (*Wms.* Gov't Trial Ex. 2A at 16, Sen. Comm. Print, Pt. 6, at 18.)

Weinberg asked whether the Senator would permit McCloud to use his name as a reference and would endorse the Piney River mine. Senator Williams assented. Feinberg cautioned, however, that while Senator Williams would confer privately with influential individuals, he would not publicize his support. All agreed that the Senator could not say that he was financially involved. ([Deleted])

---

[57] It is not clear whether this directive was carried out, although John Jacobs and John Good went to Del Ray Beach to inspect the boat, the arrangements, and the recording equipment on the yacht. They stayed nearby during the party.

[58] Weinberg told the FBI that the "dagger" was an ornamental souvenir knife he had bought in Greece.

Other guests included George Cannon, Ben Cohen, Paul Roberts, Boklan, Carpentier, Charlie White (a business associate of Carpentier's), DiLorenzo, James Meiler, Torcasio, and an assortment of confidence men, fences, and swindlers, one of whom called himself "Count Montforte." Montforte, one of Carpentier's guests, displayed to individuals on the boat, including DeVito and Weinberg, what purported to be a diplomatic passport and a document identifying him as a member of the Knights of Malta.

Later during the party, DeVito and Weinberg talked with Carpentier and Boklan about Montforte. Carpentier told his hosts that, through a man named Alexandro and Alexandro's son, who were employees of the Immigration and Naturalization Service (INS), the father in Hawaii and the son in New York, he could provide passports, green cards, and services needed by aliens seeking entry into the United States. (*Alexandro* Trial Tr. 66, 312.) This was the first time during Abscam that immigration had been promoted as a vehicle for violating federal law. The conversation was not recorded, and there is no evidence that Special Agent Amoroso prepared an FD 302 reporting Carpentier's introduction of another sphere of criminal activity. On March 24, 1979, the Miami Field Office sent to FBI HQ a comprehensive report describing the events of March 23 on *The Left Hand*. The report did not mention the discussion between the undercover operatives and Carpentier concerning immigration matters, but it did note that debriefing of the agents present at the gathering was not yet complete. ([Deleted])[59]

Later in the evening McCloud spoke with Errichetti. Each assured the other that he was trusted and that problems would be resolved. McCloud said that, while he preferred to hand the money directly to MacDonald, he would accept Errichetti acting as intermediary, as long as he knew that MacDonald was the ultimate recipient. Errichetti outlined a plan essentially like the one that Eden originally had proposed for the Errichetti payoff. McCloud would give Errichetti $100,000, which Errichetti would then give to MacDonald in the parking lot, with McCloud observing the transfer from a window. McCloud and Errichetti decided to meet with MacDonald the following week. ([Deleted])

In a conversation the next morning, Errichetti told DeVito that Senator Williams intended to promote the titanium venture to government officials. (*Wms.* Gov't Trial Ex. 3A, Sen. Comm. Print, Pt. 6, at 35-36.)

On March 26, the FBI's New York Field Office requested approval of and funds for a payout of $100,000 to MacDonald. The request document reported to FBI HQ that Jacobs and Puccio had approved the MacDonald payoff scenario presented by Errichetti: There was to be no discussion of money with the target. The report stated, however, that Errichetti would accept the money "and turn it over to MacDonald in the presence of undercover special agents." It also contended that, "at the time of prosecution, full return of this money and monies previously paid to Errichetti can be anticipated."[60] The report concluded by referring to the titanium venture and to Senator Williams, stating, "At the present time, it is unknown whether or not there is anything legitimate [sic] involved in the venture. Further investigation will be necessary to make this determination." ([Deleted])

On the same day, Brooklyn Strike Force attorney Lawrence Sharf prepared a memorandum, over Puccio's name, to a Department of Justice official in Washington, stating that Feinberg had known "the informant" for many years and knew that he was "a notorious confidence man."[61] Also on the same day, FBI HQ ordered John Good to go to FBI HQ on March 28 to discuss his request for approval to pay $100,000 to MacDonald. On March 28 the Undercover Operations Review Committee met and approved the request for $100,000 to be paid to MacDonald. Director Webster also formally approved.

On March 29 Webster memorialized two conversations, one with Puccio and one with Assistant Attorney General Heymann. In the first one, Puccio told Webster that MacDonald was "the most promising case so far." Puccio retracted his earlier statement to the FBI agents and told Webster that the money might not be recovered. He also said that Errichetti had been advised that MacDonald would have to give assurances before the money would be paid. Finally, Puccio told Webster that he saw no entrapment problem.[62]

---

[59] The Select Committee finds the failure to make any report on such a material conversation to be inconsistent with careful recordkeeping procedures.

[60] These prophecies were wide of the mark. Of the $125,000 referred to, only $25,000 has been recovered (although the Department of Justice has filed civil actions to attempt to recover additional amounts). Also, Errichetti did not give the money to MacDonald in the presence of any undercover agent, if he gave it to him at all. *See* pp. 253-61 *supra*.

[61] The controversy surrounding this memorandum is discussed at pp. 109-10, 216 *supra*.

In the second conversation, Heymann expressed his agreement with the importance of the case. He opined that the payment was warranted, even though control of the money would be lost. ([Deleted])

In a recorded conversation on March 29, Errichetti and Weinberg agreed to meet the next day. The March 30 meeting took place, was unrecorded, and was never memorialized by any FBI special agent; but Weinberg returned from it with a handwritten list of eight politicians who Errichetti had indicated were corrupt or corruptible. Among the names were those of two United States Congressmen, one of whom, Michael Myers, when contacted under different circumstances in August 1979, took a bribe. FBI officials informed the Select Committee that the FBI had arranged the March 30 meeting, but did not record it because there was no opportunity for an agent to give Weinberg a briefcase recording device before he went to meet Errichetti. No explanation was offered for the FBI's failure to get a briefcase to Weinberg between the March 29 conversation and the meeting the next day, for the failure to leave a briefcase with Weinberg on a regular basis, or for the failure to debrief Weinberg, and to prepare an FD 302, about the meeting and about the circumstances that led Errichetti to give him the list of corrupt politicians.[63]

On March 30 FBI HQ notified the New York Field Office that the requested $100,000 expenditure had been approved. The notice stated, "The Director [William H. Webster] has instructed that the $100,000 should be delivered only to Kenneth MacDonald, New Jersey Gaming Commission Control Vice Chairman. Insure that statements from MacDonald are elicited regarding assurance of casino license prior to providing payment." [64] In addition, Director Webster had written on a memorandum approving the $100,000 bribe to MacDonald, "Deliver money only to MacDonald." ([Deleted])

As planned, Errichetti met MacDonald on the morning of Saturday, March 31, 1979. After attending a dedication ceremony for a new hospital, the two men, chauffeured by DiLorenzo, drove to Abdul Enterprises, where they met McCloud.[65]

The three men stood and chatted about Long Island for some minutes. At a lull in the conversation, MacDonald hurried to the window and began to peer out through the venetian blinds, his back to McCloud and Errichetti, both of whom had moved to the desk. Errichetti announced: "I've come up for the money for the future, my boy," prompting McCloud to state that he had a "big investment in Atlantic City." As they talked, McCloud opened a briefcase that was lying on the desk. (He had placed $100,000 in cash into the briefcase before MacDonald and Errichetti had arrived.) MacDonald, still by the window, inquired about construction visible from his post. Standing by the open briefcase, McCloud called out to him, "I hope that, Ken, I hope there won't be any problems with our * * * licensing or anything else in Atlantic City." MacDonald gave no assurance; he did not even reply. Closing the briefcase, McCloud reiterated that without a casino license he would be left with "a pile of dirt * * * [b]ecause that's where the money is to be made and that's why we're all here." Errichetti took the briefcase, and all three walked out. Moments later, Errichetti and McCloud reentered the office, where Errichetti opined that all had gone well. ([Deleted])

---

[62] Technically, Puccio was correct. MacDonald's defense (which was never tested, because he died before his trial commenced) was that he never received any money and never knew that he was involved in what was supposed to be a bribe. Thus, his defense was that he had not even committed a crime, not that he had committed a crime but had been entrapped into doing so.

[63] Errichetti maintains that he and Weinberg agreed to split the money intended as a bribe for MacDonald at the March 30 meeting. They arranged that Errichetti would call Weinberg upon his return home the evening of the 31st to recite that MacDonald was pleased and that he was returning $25,000 to repair *The Left Hand*, which had sustained fire damage in the engine room. (Sel. Comm. Hrg., Sept. 16, 1982, at 134–35 (testimony of Angelo J. Errichetti).) The March 30 meeting is discussed at length at pp. 139–40 *supra*.

[64] Like all of Puccio's prophecies regarding the MacDonald transaction, both of the Director's instructions proved fruitless. The money was not delivered to MacDonald, and no assurance from MacDonald was obtained. The absence of any assurance becomes clear when MacDonald's words are compared to the bold guarantees of Errichetti throughout Abscam. The Director's instructions regarding the MacDonald payment are discussed at pp. 253–57 *supra*.

[65] Errichetti claims that MacDonald knew they were going to see McCloud and that Errichetti was going to get money, but that he had told MacDonald that it was a commission from some previous transaction involving Errichetti. He had told MacDonald that he wanted MacDonald to go along so that they could spend a relaxed day becoming better acquainted. He led MacDonald to believe that the money would be placed in escrow for the day when MacDonald and Errichetti would be out of public office and Errichetti, DeVito, Weinberg, MacDonald, and MacDonald's son and son-in-law would enter business together. Department of Justice lawyers who investigated the MacDonald case told the Select Committee that MacDonald said he was shocked to see McCloud when he walked into the Abdul Enterprises office on March 31, 1979.

John Jacobs of the Brooklyn Strike Force and FBI Supervisor John Good had been monitoring the meeting from the Hauppauge Resident Agency. McCarthy informed the Select Committee that Jacobs had told him before the meeting to be sure that MacDonald understood that Errichetti was accepting a bribe on behalf of MacDonald. McCarthy also told the Select Committee that he believed he had followed Jacobs' instructions. As noted above, however, the Director's instructions, if read literally, were ignored, and Puccio's prophecies failed to materialize: (1) The money was not delivered to MacDonald—it was delivered only to Errichetti in MacDonald's presence, with no statement made about a later transfer to MacDonald; and (2) MacDonald gave no assurance regarding a casino license before the money was passed to Errichetti.[66]

Upon leaving Abdul Enterprises' offices, Errichetti and MacDonald were driven by DiLorenzo to the Hauppauge Holiday Inn, where they joined Weinberg and DeVito in the coffee shop. Weinberg stated that McCloud had been demoted and that DeVito was in charge. MacDonald complained of McCloud's ineptitude during the prior meeting, saying that the meeting had "seemed like entrapment." They discussed future plans for MacDonald, stating that they contemplated an executive position for him and positions for his son and son-in-law. ([Deleted])

Toward the end of the conversation, Weinberg told Errichetti that he wished to speak briefly with him alone. Errichetti and Weinberg stepped out to the parking lot, followed by DeVito. Errichetti retrieved an index of New Jersey state legislators from his car. He checked off the names of those he considered corrupt and gave the book to Weinberg. Errichetti asked whether he would see Weinberg the next day. Weinberg said they would meet and told him, "I'll explain to Tony." Errichetti promised not to say anything to DeVito. ([Deleted]) [67]

APRIL 1979

As Weinberg had told MacDonald on March 31 at the Holiday Inn, DeVito did replace McCloud as President of Abdul Enterprises. McCarthy officially terminated his undercover role on April 3, 1979, continuing as the administrative agent for Abscam until May, when he requested that he be relieved.[68] ([Deleted])

In the early part of April 1979, Weinberg stalled various businessmen who were waiting to be paid and loaned money. On the apparently aborted Garden State Racetrack project, Weinberg was avoiding Ellis' inquiries and stalling competitors. In long conversations with Carpentier, Boklan, and Charlie White, a business partner of Carpentier's, Weinberg asked them to try to discover any mob association that Bob Guccione might have. ([Deleted]) Weinberg stalled Rosenberg, Carpentier, and Perry Sabloski, all of whom had produced fraudulent certificates of deposit or had acquired assets at Weinberg's request and were becoming increasingly anxious in anticipation of a financial return. ([Deleted])

In a meeting on April 3, Sandy Williams confirmed to McCloud and Weinberg that Senator Williams owned a share of the Piney River titanium mine. Sandy Williams explained the percentage share of each present shareholder in the U.S. Titanium Corporation. Feinberg had an eight percent interest as the lawyer. Sandy Williams had given the Senator, his "oldest and closest friend," half of his own 45 percent interest. Weinberg agreed that Abdul Enterprises would lend U.S. Titanium $13,000,000 to enable it to exercise its option to purchase the mine and another $70,000,000 to enable the company to buy the American Cyanamid processing plant in Savannah, Georgia. Weinberg told Sandy Williams to form a new corporation, however, of which Weinberg said he would take a ten percent interest. (*Wms.* Gov't Trial Ex. 4A, at 4–5, Sen. Comm. Print, Pt. 6, at 40–41.)

On the next day Weinberg prepared to attempt to convince Bob Guccione that he would have to bribe a politician in order for Abdul Enterprises to finance the Penthouse casino and hotel that Guccione was planning. In conversations with Guccione's casino manager, Tony Torcasio, and construction contractor, Babe Dinallo, Weinberg sought to instill personal distrust of Guccione, impute underworld connections to him, and foment doubt that he would be granted a casino license. Torcasio rejected Weinberg's conclusion that Guccione had failed in his previous ventures into the hotel or casino businesses. Contrary to Weinberg's suggestions, Torcasio and Dinallo insisted that Guccione was not connected to organized crime. ([Deleted])

---

[66] For a complete discussion of the MacDonald transaction, see pp. 241–62 *supra*.

[67] After a thorough investigation, the Select Committee has concluded that Weinberg and Errichetti did clandestinely meet the following day, April 1, 1979, and that Weinberg received a portion of the MacDonald payment. For a discussion of the events of April 1, 1979, *see* pp. 142–49 *supra*.

[68] McCarthy told the Select Committee that it is virtually impossible for a formerly covert agent who has resumed overt status to control an informant effectively. (Sel. Comm. interview of John M. McCarthy, Sept. 2, 1982.)

Guccione went to Abdul Enterprises' office on April 5, 1979. Guccione rebutted Weinberg's accusations that he had mismanaged his earlier casino or hotel ventures and that he was backed by organized crime. Guccione countered Weinberg's claims that Guccione would not get a license and indicated that there was no need to bribe a casino commissioner. He offered Abdul Enterprises the first purchase rights to his casino site in the unlikely event that his application was denied. ([Deleted])[69]

On April 5 the New York Field Office sent a teletype to FBI HQ requesting a conference on April 12 at the Hauppauge Resident Agency. The stated purposes of the proposed meeting were to consider potential payoff targets and to determine the advisability of electronic surveillance. ([Deleted]) On April 10 the New York Field Office sought permission from FBI HQ to monitor and to record conversations with several suspects, but the request was for consensual monitoring only. ([Deleted]) Permission was granted. A conference was held at FBI HQ on April 12 to evaluate and to plan coordination of the investigation among the participating jurisdictions. The senior agents managing Abscam in New York, Miami, and Newark attended. ([Deleted])

On April 9 Weinberg received a lump sum payment of $5,000. The New York Field Office had requested on February 16, 1979, that Weinberg be awarded $15,000, but the Criminal Investigative Division decided on March 28, 1979, that only a payment of $5,000 was justified. (*Kelly* Weisz Def. Trial Ex. 30.)

Weinberg, DeVito, and Errichetti discussed establishing check-cashing businesses in New Jersey cities. The first recorded talk of this enterprise was on April 9, 1979. Errichetti referred to [deleted], who Errichetti said "will take the money from you," unlike MacDonald. DeVito speculated that $25,000 would suffice, but Errichetti differed, contending that the [deleted] was more valuable than a casino control commissioner. ([Deleted])

Later in the month Robert J. Del Tufo, United States Attorney for the District of New Jersey, assigned two of his Assistant United States Attorneys, Edward J. Plaza and Robert A. Weir, Jr., to perform that office's investigative and prosecutorial functions in Abscam. Their eventual disagreement with the nature of the undercover investigation developed into one of Abscam's major conflicts.

On April 18, 1979, John R. Stowe, the South Carolina businessman with whom Weinberg had spoken many times in late 1978 and early 1979 in unrecorded conversations, again contacted Weinberg. Stowe identified his Congressman friend as Representative John Jenrette from South Carolina. (*Jenrette* Def. Trial Ex. 31.) The Miami Field Office sent a teletype to FBI HQ requesting an indices search on Jenrette. ([Deleted])

On April 23, 1979, Weinberg urged Sandy Williams to see if Senator Williams would exert his influence to secure any permits they might need for the titanium mine and plant. Weinberg also asked whether Senator Williams could help obtain bids on government chemical contracts. ([Deleted]) Sandy Williams was uncertain. Sandy Williams said that Feinberg would hold Senator Williams' concealed 20 per cent interest in the new corporation that would be formed in response to the loan from Abdul Enterprises. Weinbeg and Sandy Williams then made tentative plans to visit the plant in Georgia. ([Deleted])

MAY 1979

Weinberg, Sandy Williams, and George Katz went to Savannah, Georgia, on May 8 and 9, 1979. (*See Wms.* Trial Tr. 1247.) There are no recordings from the trip, and FBI special agents did not prepare any report of any debriefing of Weinberg upon his return.

Also during this period Weinberg and the undercover agents apparently decided to let the Garden State Racetrack project expire. John Burnetti from Hialeah, a racetrack in the Miami, Florida, area, seemed eager to take over the project. ([Deleted]) It is unclear whether he did so, but eventually all Abdul Enterprises' contact with Edward Ellis halted.

On May 5, 1979, DeVito and Weinberg met with Philip Schwab, a builder and contractor, and Pat Amarotti, with whom Weinberg had been indicted in Florida in 1977, Schwab had been hired by Morris Schenker, majority shareholder of the Dunes Casino in Las Vegas, who planned to build a Dunes in Atlantic City. Amarotti, working as a broker for Schwab, led him to seek financial support from Abdul Enterprises. Five days later Feinberg approached Weinberg about the same project. A New Jersey construction contractor and consultant, Joseph Silvestri, had recommended Feinberg as the Dunes' lawyer because of Feinberg's political influence in New Jersey. Silvestri himself emerged in the latter part of 1979 as a major Abscam middleman.

---

[69] The controversy surrounding this meeting is discussed at pp. 309–12 *supra*.

On May 8, the Washington, D.C., Field Office informed the Miami, New York and Newark Field Offices that there was a case file in Washington on Representative Jenrette based on his involvement in an alleged bank fraud and embezzlement scheme with John Stowe in 1971. Although no prosecution had resulted, civil actions had been filed. The May 8 teletype referred to both men's reputed "financial difficulties," adding that Jenrette was said to be a "close associate of Abscam subjects Keith Thelbert Jones and Jack Dudley Morris." ([Deleted]) Morris had been arrested by Abscam operatives at LaGuardia Airport with $200 million in fraudulent certificates of deposit on October 4, 1978.

In his dealings with John Stowe in mid-May, Weinberg began to develop a theme that came to dominate the Abscam investigation. He explained to Stowe that "Arabs * * * always like to have friend in high office * * * and [that by the sheik's] doing something for the Congressman, he has got a friend in high office." Money was no object. (*Jenrette* Gov't Trial Ex. 35, at 3-4.)

The FBI's Columbia, South Carolina, Field Office also conducted a file search on Jenrette and Stowe. Its report stated that Stowe had been investigated by the FBI for bank fraud and embezzlement and that Jenrette had been investigated for attempting to obtain an improper loan from the Myrtle Beach Air Force Base Federal Credit Union. Stowe had been questioned about $225,000 in loans from the same source. Although there was no criminal prosecution, the credit union brought a civil action against Jenrette and Stowe. Informed sources had told the FBI that both men were experiencing financial difficulties. ([Deleted])

During this period, the titanium venture consumed more of the informant's and undercover agents' time. In West Palm Beach on May 15, Alex Feinberg disclosed to DeVito that Senator Williams was friendly with [deleted] of the New Jersey Casino Control Commission, and that Feinberg, at Senator Williams' request, had represented the Ritz Carlton in its successful application for a casino license earlier that week. Senator Williams, Feinberg said, had called to commend Feinberg's successful efforts and had mentioned that he himself had called [deleted]. ([Deleted]) Feinberg indicated that Jeanette Williams, the Senator's wife, was involved. He also mentioned that Joseph Silvestri had introduced him to Morris Schenker.

George Katz used news reports that the United States government needed titanium for sheathing submarines and defense aircraft to try to increase Weinberg's interest in the Piney River mine and American Cyanamid processing plant. ([Deleted]) Weinberg then used the government's need for titanium to determine whether Senator Williams would use his office improperly. On May 30, 1979, Weinberg asked Feinberg if Senator Williams would solicit government titanium contracts on their behalf. Feinberg said Williams would try. (*Wms.* Gov't Trial Ex. 6A, Sen. Comm. Print., Pt. 6, at 50-51.)

Senator Williams, Feinberg, Sandy Williams, Katz, DeVito, and Weinberg met for lunch at the Hotel Pierre in New York on May 31, 1979. The participants discussed the Senator's helping to obtain the titanium contracts and whether his interest in the venture could be disclosed. (*See Wms.* Gov't Trial Exs. 7A-1, 7A-2, 7A-3, Sen. Comm. Print, Pt. 6, at 52-58.) [70]

DeVito had asked Carpentier to obtain passports for himself and Weinberg, but by May 30, DeVito had a new scenario to propose. ([Deleted]) Reminding Carpentier of his previous offer of green cards and immigration assistance, DeVito explained that Sheik Habib owed a favor to a colleague in Ireland. Assisting in bringing the man's son into the United States as a permanent resident alien would satisfy the debt.[71]

DeVito asked Carpentier how much it would cost to arrange the matter. Carpentier estimated a minimum of $10,000. Carpentier then explained the legal procedures necessary to gain entry as a permanent resident alien. The INS inspector, whom he named as Alexander Alexandro, was adept at expediting processing of a "green card," or work permit. DeVito gave Carpentier $500 for "expenses" and as compensation for past favors. ([Deleted]) Carpentier arranged the meeting for the following day.

---

[70] The meetings at the Hotel Pierre are discussed in detail at pp. 220-24 *supra*.

[71] To lend credence to this stratagem, Supervisor Good volunteered a cousin of his in Ireland named Thomas Foley to portray the prospective immigrant. He would never have to appear, but he did have a file at INS in Washington. (*Alexandro* Trial Tr. 152.)

By May 31, Carpentier had told Alexandro that Alexandro was going to meet two friends of Carpentier's, DeVito and Weinberg, who had an immigration problem. Alexandro said that he had been told that DeVito and Weinberg represented wealthy Arab sheiks and that, in return for Alexandro's help or guidance, Carpentier, Charlie White, and Weinberg each would get $5,000. (*Alexandro* Trial Tr. 653-54.)

When DeVito and Weinberg met with Carpentier, White, and Alexandro that day, they concluded the business of the meeting quickly, because DeVito had insufficient information about his candidate. Alexandro counseled him on the information he would need, pointing out that "there's always avenues that you * * * circumvent legally." (*Alexandro* Gov't Trial Ex. 3A, at 5.) Carpentier offered sponsorship under the aegis of the Beefalo Cattle and Land Company. (*Id.* at 7.) [72]

Special Agent Ernest Haridopolos, who had participated briefly in Weinberg and Fuller's operation in 1977, was assigned an Abscam undercover role under John Good's supervision in May 1979. ([Deleted]) As "Ernie Poulos," Haridopolos conducted surveillance of the individuals who met with Abdul Enterprises personnel. (*Jannotti* Pre-trial D.P. Tr. 5.166.)

JUNE 1979

By June 1979 Abscam was deemed sufficiently significant that Attorney General Griffin Bell and Deputy Attorney General Benjamin Civiletti attended a briefing. Abscam was described to them as a New Jersey Casino Control Commission case. (Sel. Comm. interview of Irvin Nathan, July 15, 1982.)

On June 15 Weinberg received a lump sum payment of $15,000. This was the sum that the New York Field Office had requested on May 14 and for which the Miami Field Office had provided further support on May 21. (*See Kelly* Weisz Trial Exs. 31, 32.)

In the first two weeks of June 1979 Weinberg reminded Feinberg, Errichetti, Katz, and Sandy Williams that it was important to the success of the mining venture that the Senator keep his interest concealed. (*See, e.g., Wms.* Gov't Trial Ex. 8A, Sen. Comm. Print, Pt. 6, at 59-60; [Deleted]) In a meeting at the Cherry Hill, New Jersey, Hyatt House on June 15, 1979, attended by Errichetti, Katz, Feinberg, Sandy Williams, Weinberg, and DeVito, DeVito suggested that Senator Williams and Sheik Habib meet personally. (*Wms.* Gov't Trial Ex. 10A, Sen. Comm. Print, Pt. 6, at 70.) [73]

Sometime in the late spring, DiLorenzo purchased for Errichetti three color televison sets to be given to Weinberg, ostensibly to be transmitted to the directors of Abdul Enterprises. DiLorenzo delivered the television sets to Weinberg on June 14 or June 15 at the Cherry Hill Hyatt House, where Errichetti, Weinberg, DeVito, and Bradley (Special Agent Brady) were meeting in connection with the titanium project.[74] Weinberg proceeded to drive to Florida, to where he was in the process of moving.

The meeting between Senator Williams and the sheik that had been suggested by DeVito on June 15 was scheduled for June 28. Prior to that meeting the Senator was briefed by Feinberg, Errichetti, and Sandy Williams on how to act and on what to say. (*See, e.g., Wms.* Gov't Trial Exs. 11A, 12A, 13A, 14A, Sen. Comm. Print, Pt. 6, at 78, 82, 83, 93; [Deleted]) Immediately prior to meeting with the sheik, Weinberg told Senator Williams that the meeting was "all talk, all bullshit." (*Wms.* Gov't Trial Ex. 14A, at 5, Sen. Comm. Print, Pt. 6, at 97.) During the actual meeting, the Senator bragged about his influence and stressed the importance of titanium to the government. (*Wms.* Gov't Trial Ex. 15A, Sen. Comm. Print, Pt. 6, at 104.) [75]

---

[72] Alexandro testified that none of what he had said was true; he had first laid out the legal avenues of entry to the United States, but "it became very strange" when he heard talk of $15,000 plus whatever he wanted for himself. He said that "this rang a bell" in his head that "there was more to this than met the eye." (*Alexandro* Trial Tr. 656-57.)

[73] Weinberg's actions between the meeting at the Hotel Pierre on May 31 and the meeting on June 15 in encouraging the Senator to keep his interest concealed and to make explicit his willingness to misuse his influence are described at pp. 220-26, 229-30 *supra.*

[74] This episode and other allegations that Weinberg solicited and received gifts from Abscam suspects are discussed at pp. 112-29 *supra.*

[75] The events leading to the June 28, 1979, meeting, and Weinberg's coaching in particular, are discussed at pp. 229-34 *supra.* Sometime at the end of June, Katz gave Weinberg three expensive wristwatches. For a discussion of the controversy surrounding this incident, see pp. 123-27 *supra.*

Errichetti and DeVito met on June 29, 1979, at the Abdul Enterprises office with [deleted].[76] DeVito brought with him an application for a check-cashing license and was prepared to offer a bribe to [deleted] to maneuver it through the bureaucracy.

[deleted] boasted of his influence. Errichetti supported his claims that he controlled the New Jersey State Assembly and the consumer credit division of the state's banking department. But, when it came to check-cashing businesses, DeVito soon ascertained that licensing was a routine matter of a standard application and a five dollar fee. He challenged [deleted], "Explain to me then, if it's so easy like this, why do I need you?" [77] [deleted] tried to convince DeVito that he could be instrumental and was eager to cooperate.

At this point, Weinberg interrupted to tell DeVito he had a telephone call.[78] DeVito left and, upon his return, spoke bluntly to [deleted] stating, "Hey, let me lay it out for you, okay, my position. I'm looking to buy your influence, okay?" ([Deleted]) In the same vein he expressed explicitly that he did not need [deleted] to perform functions that a lawyer or another official could perform. [deleted] offered advice on applying for a check-cashing license, and the meeting closed with the understanding that [deleted] was available to assist in more substantial undertakings. ([Deleted]) Neither DeVito nor Weinberg approached him again.[79]

In the latter part of June and the first part of July, Feinberg worked on legal matters pertaining to the construction of the Dunes casino. Feinberg mentioned the name of the construction consultant who had recommended Feinberg for the Dunes project, Joseph Silvestri, to Weinberg. ([Deleted])

JULY 1979

In early July 1979, the participants in the titanium venture discussed the creation of a corporate structure. Senator Williams' interest was to be concealed, and his shares were to be endorsed in blank. (*Wms.* Gov't Trial Ex. 17A, at 2-3, Sen. Comm. Print, Pt. 6, at 136-37.) A shareholders' meeting was scheduled for July 11.[80] On July 9, Weinberg told Sandy Williams that the Senator could have $20,000 in expense money. ([Deleted]) [81]

Sometime near July 4, Errichetti told Weinberg that he had received a visit at his home from a man named Stan Myatt, to whom Tony Torcasio had introduced him several months before. ([Deleted]) Myatt had warned Errichetti that Abdul Enterprises was an FBI front operation and that Errichetti was in trouble. Weinberg claims that, after Errichetti had recounted Myatt's story, Weinberg refuted it. (Sel. Comm. Hrg., Sept. 16, 1982, at 188-89 (testimony of Melvin C. Weinberg).) On July 11 Errichetti, at Weinberg's request, repeated the Myatt story for DeVito. Errichetti stated that Myatt had asserted that there were no sheiks, there was no money, and FBI agents were involved. Errichetti said that Myatt had told him that he had been a guest of Rick Wynn and Ben Cohen at the March 23 party on *The Left Hand* and DeVito agreed that Myatt had been present. ([Deleted])

---

[76] The [deleted] meeting originally had been scheduled for June 26, but had been postponed because of the need to prepare for the meeting on June 28 with Senator Williams. ([Deleted]) On June 23, 1979, FBI HQ, including the Undercover Operations Review Committee, had authorized a bribe of $50,000 to [deleted], if the necessary conditions were fulfilled at the meeting.

[77] As early as April 4, when the Abdul Enterprises representatives and Errichetti first explored check-cashing as a possible investment, Errichetti indicated that licensing was a simple procedure; he could issue one in Camden, and other mayors could do the same in their respective jurisdictions. ([Deleted]) Subsequent recorded discussions in May substantiated the impression Errichetti had conveyed: that such licenses were routinely processed and granted. It remains a mystery why, with every indication that there was no reason to bribe a public official or political figure in order to get a check-cashing license, the FBI used that scenario.

Moreover, in response to the Select Committee's inquiry, the FBI acknowledged that it had not conducted "any research before the meeting on requirements of obtaining check cashing licenses in the State of New Jersey." (Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr., at 4 (Nov. 8, 1982).)

[78] Lawrence Sharf, an attorney with the Brooklyn Strike Force, told the Select Committee that he had monitored the session from the FBI Resident Agency in Hauppauge via a telephone connection to the Abdul Enterprises office several miles away. He did telephone Amoroso at one point, although he does not recall what either of them said or its effect on the conversation with [deleted]. Sharf emphasized that the audio monitor was of particularly poor quality.

[79] In the interval report to the Director, the Brooklyn-Queens Resident Agency wrote that the reason no bribe offer was made was that [deleted] had "failed to offer adequate assurances."

[80] The meeting had originally been scheduled for July 5 in Florida, but, upon Puccio's request that it be conducted in New York, it was relocated and postponed. ([Deleted])

[81] An airtel from Brooklyn-Queens to Director Webster incorrectly attributed the genesis of the expense money payment to Sandy Williams and incorrectly stated the amount as $10,000. ([Deleted]) No money was ever paid to Senator Williams. ([Deleted])

DeVito rebutted Myatt's charges, explaining that Cohen, Wynn, and Myatt had been rejected when they had sought Abdul Enterprises' financing. Errichetti quoted himself as having told Myatt, "Now, if I'm gonna get indicted, I've been indicted before," and "I talked to a couple of people about this association you just mentioned. And, if they're FBI guys, they're FBI guys; that's my business." He added that he had learned that Myatt had been arrested four times.[82] ([Deleted])

Feinberg convened a meeting at the International Hilton at John F. Kennedy Airport in Queens, New York, shortly before noon on July 11, 1979. Errichetti, Katz, Sandy Williams, Weinberg, DeVito, and William Evoy, a junior partner in Feinberg's law firm, were present. They established three separate corporations, distributed stock certificates, adopted by-laws, and elected directors and officers. They decided, as Weinberg had planned, that Senator Williams' share could be voted only if he were present. Feinberg endorsed the Senator's shares in blank. (*See Wms.* Gov't Trial Ex. 19A, Sen. Comm. Print, Pt. 6, at 142.)

Also on July 11 Weinberg spoke with John Stowe, who arranged for Jenrette to meet with Abdul Enterprises' representatives in Washington, D.C., on August 6, 1979. (*Jenrette* Def. Trial Ex. 36.) The meeting was cancelled, however, on July 21, 1979. (*Jenrette* Trial Tr. 432–33, 1706–07.)

On July 12, 1979, Weinberg asked Katz to "find out what other people we got to reach out for" in Philadelphia. Katz reminded Weinberg that Katz had already given him the name of George Schwartz, the Philadelphia City Council President. ([Deleted]) Two days later Weinberg described to Katz the Arabs' potential immigration needs and interest in meeting politicians. ([Deleted]) This July 14 conversation constitutes the first recorded use of the asylum scenario. (*See* page 79 *supra.*)

The government adopted a new scenario for the titanium venture shortly after the shareholders' meeting. Weinberg informed Katz and Errichetti that another group of Arab investors would buy the titanium mine and processing plant for a profit of $50 to $70 million. ([Deleted])

In early July 1979 a Philadelphia lawyer and city councilman named Louis G. Johanson played golf with Errichetti's neighbor James Meiler. Meiler told Johanson that Errichetti had connections with representatives of wealthy Arab investors. Johanson passed this information on to his law partner Howard L. Criden, whose client David Neifeld, together with Neifeld's accountant, Norman Berman, was seeking financing and a possible buyer or operator for a hotel casino on a site in Atlantic City. Meiler arranged for Johanson and Criden to meet Errichetti at Meiler's home on July 14. (*Lederer* Trial Tr. 644–46; *Jannotti* Post-trial D.P. Tr. 1.5–.6.)

The meeting occurred as scheduled. During the meeting, Errichetti called Weinberg, who listened as Errichetti and Johanson outlined the project. Weinberg suggested to Johanson that they meet to examine the prospectus on *The Left Hand* in Fort Lauderdale on July 26, and Johanson agreed. ([Deleted])

In preparation for that meeting, the law firm of Criden, Johanson, Dolan, Morrisey & Cook drafted two letter agreements for Niefeld's and Berman's signatures. One prescribed the financing arrangement that would apply if Abdul Enterprises agreed to back the project; the other was a sales agreement. Under the terms of those contracts, the law firm might earn up to five million dollars. The agreements were signed by July 25, 1979. (*Myers* Trial Tr. 1121–24; *Lederer* Trial Tr. 647–48; *Jannotti* Post-trial D.P. Tr. 1.8–.9.)

In July 1979 Weinberg moved his family from Central Islip, Long Island, to Tequesta, Florida, where he had purchased a townhouse. Weinberg's moving expenses were paid by the FBI. Ledger sheets show a $1,796 disbursement for "moving van expenses" paid on August 22, 1979, and a $6,000 lump sum payment to Weinberg for "resettlement expenses" on November 1. (*Kelly* Weisz Def. Trial Ex. 5.) The "resettlement expenses" were unspecified, and the FBI neither required nor obtained expense vouchers. (*See* Letter from Oliver B. Revell to Malcolm E. Wheeler (Dec. 6, 1982).) The FBI did not require Weinberg to move to Florida, but instead merely acquiesced in his decision to move. (*See* Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr., at 9 (Nov. 8, 1982).) Therefore, the full $7,796 was additional compensation and income.

In connection with his move, Weinberg engaged in several financial transactions with FBI special agents. Agents purchased clothing and furniture from Weinberg both for personal use and for use in an unrelated undercover operation. One agent loaned Weinberg money and another agent accepted gifts from Weinberg. (*Compare* Affidavits of Special Agents Anthony Amoroso, Gunner A. Askeland, John Good, Carol A. Kaczmarek, John McCarthy, and Thomas M. McShane, *reprinted in* 128 Cong. Rec. S 1517-18 (daily ed. Mar. 3, 1982) *with* Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr., at 8-9 (Nov. 8, 1982).)

---

[82] Errichetti told the Select Committee that he had seen Myatt one other time, in approximately December 1979. Myatt told the Mayor, "[M]an, you did a number on me." Errichetti thought Myatt had been physically assaulted for having identified the FBI's undercover operatives. (Sel. Comm. Hrg., Sept. 15, 1982, at 87–88 (testimony of Angelo J. Errichetti).)

Robert J. Del Tufo, then United States Attorney for the District of New Jersey, sent a letter to Puccio on July 13 describing previous Abscam activities pertaining to New Jersey. He expressed concern that the public corruption investigation might languish and hoped that they could "establish a firm understanding of our future course of action." He proposed that they meet in Washington, D.C., with Assistant Attorney General Philip B. Heymann and other Department of Justice officials to "clarify the situation," because in his view they had made "little progress in devising and agreeing upon a comprehensive plan." ([Deleted])

A meeting was held in Washington on July 18 among Del Tufo, Puccio, Heymann, Edward Korman, the United States Attorney for the Eastern District of New York, Robert Stewart, Chief of the Newark Strike Force, and David Margolis, Chief of the Organized Crime and Racketeering Section of the Department of Justice. According to Margolis, the July 18 meeting was devoted to deciding where to seek indictments in the cases being investigated. Del Tufo was adamant that some cases be prosecuted in New Jersey. Heymann deferred the decision. (Sel. Comm. interview of David Margolis, Sept. 3, 1982.)

A similar meeting took place on July 25. At that meeting, Heymann instructed the New Jersey prosecutors to prepare a plan for conducting their own investigation into political corruption in New Jersey, focusing on the lists of legislators that Errichetti had supplied to Weinberg on March 30 and 31. The plan was to be submitted to officials in the Department of Justice for approval. Margolis told the Select Committee that, during the July 25 meeting, either he or Irvin Nathan, then Deputy Assistant Attorney General, in Margolis' presence placed a telephone call to the FBI to ensure its cooperation with Del Tufo. Margolis and Deputy Chief of the Organized Crime and Racketeering Section Gerald McDowell told the Select Committee that, although the New Jersey investigation was discussed at subsequent meetings, and although Department of Justice officials frequently told the New Jersey prosecutors to submit a proposal for going forward with an investigation of the New Jersey public officials included on the Errichetti lists, no plan was ever submitted in 1979. (*Id.;* Sel. Comm. interview of Gerald McDowell, Sept. 3, 1982.)

Speaking with Weinberg in Florida on July 21, John Stowe changed the location of their scheduled August 6 meeting with Congressman Jenrette. Following Amoroso's instruction, Weinberg cancelled the meeting. (*Jenrette* Trial Tr. 432-33.)

On July 24 there was a conference at FBI HQ, attended by Supervisor John Good, Headquarters Supervisor Michael Wilson, Special Agents Anthony Amoroso and William Riley, and John Jacobs of the Brooklyn Strike Force. The FBI supervisors determined that four public officials had been identified who had not yet been approached and who should be contacted: Mayor [deleted], [deleted] of the New Jersey Casino Control Commission, New Jersey [deleted], and Mayor [deleted].[83] The report on the meeting stated, "It is felt that meetings with the above individuals will be completed within the next three months and that the operation will be terminated." Unofficially, it had been determined that Puccio was authorized by the Department of Justice to prosecute the cases. ([Deleted])

Nothing in the report reflected the status of the investigation of Senator Williams or the status of the new casino financing package that Criden and Johanson were to present to Abdul Enterprises aboard *The Left Hand* on July 26. There also was no mention of the Alexandro immigration case or of Jenrette. No mention was made of Weinberg's July 14 conversation with George Katz, in which Weinberg had articulated the rudiments of the "asylum" scenario that was later to become the mechanism for offering bribes to Congressmen.

On July 26 DeVito and Weinberg met with Criden, Johanson, Meiler, and Errichetti aboard *The Left Hand.* Criden and Johanson presented the Neifeld-Berman hotel-casino prospectus. At the close of the business meeting, DeVito suggested that they go for a cruise along the Intracoastal Waterway. The ensuing coversation was not recorded. While they were cruising north, the skipper, Rusty Allison (Special Agent George Allen), pointed out a yacht that he said belonged to Anastasio

---

[83] Mayor [deleted] was still listed as a suspect at a meeting in Valley Forge, Pennsylvania, on August 30, attended by John Good and Special Agents in Charge of the Newark and Philadelphia Field Offices. ([Deleted]) Although there were intervening references to [deleted] in recorded conversations between Weinberg and Errichetti and between Weinberg and Feinberg ([Deleted]), there is no recorded conversation with [deleted].

Somoza, the recently ousted leader of Nicaragua. Referring to an article in the previous day's *Miami Herald*, which had stated that the United States Government might reject the deposed dictator's plea for political asylum, DeVito confided to Errichetti and Criden that his employers, Yassir Habib and Kambir Abdul Rahman, were concerned about precarious political conditions in the Mideast. DeVito alluded to the overthrow of the Shah of Iran and to instability in Afghanistan and Ethiopia. The shieks were anxious to ensure that they would not face Somoza's predicament should they, too, seek political asylum in the United States. (*Myers* Trial Tr. 581; *Lederer* Trial Tr. 398-99, 403-04.) Errichetti said that he had the right political contacts, and that the Arabs had sufficient financial resources, to take care of the problem. DeVito stated that money was no object and asked Errichetti to find out what it would cost. (*Id.* at 403-03A.)[84]

Upon returning to their Philadelphia office, Johanson and Criden described their experience in Florida to other members of their firm. Ellis Cook, a junior partner, testified at trial that Criden had mentioned that the sheik would give $100,000 to make sure that politicians were "beholden" to him when the time would come for him to seek a "safe haven" in the United States. (*Id.* at 651-52.) Cook testified that Criden had suggested to Johanson that he solicit Representatives Michael J. ("Ozzie") Myers and Raymond F. Lederer from Pennsylvania, whom Johanson, a ward leader in the local Democratic Party, knew. (*Id.* at 652-53.)

On July 29 Weinberg telephoned Errichetti. They discussed the Congressmen whom Criden and Johanson had agreed to approach, but Errichetti did not tell Weinberg that Criden and Johanson were the source:

WEINBERG: Beautiful, what's his name?

ERRICHETTI: Myers.

WEINBERG: Myers?

ERRICHETTI: Congressman Myers.

WEINBERG: Beautiful.

ERRICHETTI: He's from Philadelphia.

WEINBERG: All right. When we meet up there, we'll go the * * * over that, all right?

ERRICHETTI: Well, there's a couple of other ones, too.

WEINBERG: Who else?

ERRICHETTI: Well, there's * * * there's a possibility * * * I * * * chatted with him just briefly on it and I have to meet with, you know, personally.

WEINBERG: Who's that?

ERRICHETTI: Congressman Lederer.

WEINBERG: Congressman "Leder?"

ERRICHETTI: Lederer * * * L-E-D-E-R * * * let's see L-E-D-R * * * Lederer.

WEINBERG: Alrighty.

ERRICHETTI: He's also from * * * ah * * * Pennsylvania.

WEINBERG: O.K.

ERRICHETTI: There's a possibility, like, there might be two from Florida.

WEINBERG: Yeah, which ones are them?

ERRICHETTI: Ah, they're checking them out.

WEINBERG: Oh.

ERRICHETTI: They * * * they're checking them out for me (laughs).

WEINBERG: O.K. Beautiful.

ERRICHETTI: Now, ah, I've also, has the potential for the Department of Naturalization * * * one of the officials.

WEINBERG: All right.

ERRICHETTI: For the green card.

WEINBERG: Right.

ERRICHETTI: And he said * * * ah * * * I said to him what about * * * ah * * * guaranteeing this * * * my, my friend the sheik * * * (inaudible) * * * needs one.

WEINBERG: Right.

ERRICHETTI: When you coming up?

WEINBERG: Well, we'll be up, if you get us by set by, say sixth, we'll come up that weekend, next weekend.

ERRICHETTI: For * * * ah * * * a couple of those things.

WEINBERG: Yeah, and we'll take care of everything at one time. We'll be up there for a couple of weeks then.

ERRICHETTI: O.K. How many can you handle?

WEINBERG: As many as you can give me, I can handle.

---

[84] The controversy over the origin of the asylum scenario is discussed in detail at pp. 77-83 *supra*.

ERRICHETTI: O.K.

WEINBERG: 'Cause that's number one priority with him.

ERRICHETTI: Well.

WEINBERG: Specially after they came out with that Somoza thing.

ERRICHETTI: Well. There's a couple of Congressmen, I think we can work these things * * * at least, ah * * * may * * * could be five or six of them.

WEINBERG: Beautiful.

ERRICHETTI: All right. (*Myers* Gov't Trial Ex. 19A, at 1-3.)[85]

On July 30, while Criden was in Errichetti's office, and on July 31, Weinberg and Errichetti discussed arrangements for meetings with Myers and other Congressmen. (*See Myers* Gov't Trial Exs. 20A, 21A, 22A.) Errichetti told Weinberg that, in addition to Myers and Lederer, he thought he could arrange meetings with "two [Congressmen] from Florida, one from Georgia, and maybe one from California." (*Myers* Gov't Trial Ex. 21A, at 1.)

Througout the end of July and the beginning of August 1979, Weinberg was in frequent communication with Errichetti, Feinberg, Katz, and Criden. Feinberg was representing other clients who were constructing, or attempting to procure licenses to build, additional Atlantic City casinos. He wanted to introduce the construction consultant, Joseph Silvestri, to Weinberg through Errichetti. ([Deleted])

AUGUST 1979

On August 4 DeVito and Weinberg flew from Florida to New York to keep their appointment with Senator Williams on the next day. In New York they fortuitously met Vincent Cuti, who had been Weinberg's attorney. Weinberg told Cuti that he was connected with Abdul Enterprises, which was involved with Mayor Errichetti. Cuti told Weinberg and DeVito that he was representing Bowe-Walsh, an engineering consulting firm implicated in a pending bribery case involving the Southwest Sewer District on Long Island. ([Deleted])

On August 5 DeVito and Weinberg conferred at the FBI Resident Agency at Kennedy Airport with Brooklyn Strike Force attorneys John Jacobs and Lawrence Sharf (*see Myers* D.P. Tr. 3480), who had reviewed the audio tape of the so-called "coaching session" that Weinberg and Errichetti had conducted on June 28 immediately before Senator Williams' meeting with Sheik Yassir Habib.[86] Sharf has testified that he told Weinberg on August 5 not to "push things, that he had to let events take a natural flow." (*Id.* at 3480-81.) Jacobs has testified that he told Weinberg on August 5 that coaching was "not a good idea" (*id.* at 3154) and that he and Sharf had "hit the ceiling." (Sel. Comm. interview of John A. Jacobs, July 23, 1982.)

DeVito, Weinberg, and Errichetti met at 4:00 p.m. at the Northwest Airlines Lounge at John F. Kennedy Airport. Errichetti said that he was "working on" arrangements with Senator [deleted]. He also said that the two Florida Congressmen "were approached, they said yes," but that he would have to visit them for a briefing. He said that Myers would give them solid guarantees of support. (*Myers* Gov't Trial Ex. 1A.)

In less than an hour, Senator Williams, along with his wife and two aides, arrived in the airport lounge. DeVito handed him the stock certificates for his share in the titanium company. Feinberg had endorsed the shares in blank, and Bill Evoy had witnessed the signing. Errichetti explained to Senator Williams the potential resale of the titanium venture for a profit of $50 million.[87] (*See Wms.* Gov't Trial Ex. 21A, at 4-5, Sen. Comm. Print, Pt. 6, at 186-87.) DeVito described to Williams the structure of the corporation. (*See id.* at 5-10, Sen. Comm. Print, Pt. 6, at 187-92.)

Also on August 5, from a hotel at Kennedy Airport, DeVito called Alexandro at his home on Long Island. (*Alexandro* Gov't Trial Ex. 8A.) The next day, Alexandro told DeVito that the client should come into the United States and promised to arrange a sham marriage with a woman he knew. (*See Alexandro* Gov't Trial Ex. 9A; [Deleted])

On August 6, DeVito and Weinberg met with Errichetti at the Cherry Hill Hyatt House. Weinberg and Errichetti discussed arrangements for the first payoff to Myers. (*Myers* Gov't Trial Ex. 2A.) Errichetti further said that Bowe-Walsh had been a sewer consultant for the city of Camden since 1979. Errichetti told them that Charles Walsh of Bowe-Walsh had promised him a $40,000 kickback, but had never provided any of the money. ([Deleted])

---

[85] Myers testified that Johanson visited him in late July or early August to propose that Myers meet the sheik in return for money. (*See Myers* Trial Tr. 2709-13.) Cook testified that Johanson had told him within a week after July 26 that Myers had agreed to meet with the sheik or the sheik's representatives. (*See id.* at 1135-36.)

[86] The June 28 coaching session is discussed at length on pp. 229-34 *supra*.

[87] The controversy surrounding the size of the inducements offered to Senator Williams is discussed at pp. 235-37 *supra*.

On August 7 DeVito and Weinberg conducted two meetings, one with Errichetti, Feinberg, and Katz, and another with Errichetti, Criden, and Meiler. At the first meeting Katz and Feinberg received their stock certificates for the titanium corporations. Katz mentioned that he had paid [deleted] mayor, [deleted], $35,000, and [deleted] aides another $10,000, in connection with [deleted] garbage collection contract, which would expire in January 1980. Katz said that he intended to give [deleted] $80,000 to renew the contract. ([Deleted])

The second meeting began with a discussion of Neifeld's casino project, after which Meiler left. At that point, conversation turned to implementation of the asylum scenario. Criden said that there would be three additional candidates: [deleted] Senator [deleted] and Representatives [deleted] and [deleted]. Arrangements for the impending meeting with Representative Myers were also discussed. Weinberg urged that Myers "come on strong" at his meeting with the sheik. Criden and Errichetti responded that Errichetti would brief Myers.[88] (*See Myers* Gov't Trial Ex. 3A.)

DeVito and Weinberg held several meetings on August 8. Errichetti and Vincent Cuti were present at one. Cuti said that he had not been the attorney for Bowe-Walsh at the time in question, but he knew that Errichetti was supposed to get money from his client. He claimed that the money had been sent to Errichetti, but that "somewhere along the line, somebody had grabbed it." Cuti promised Errichetti that Bowe-Walsh would give him something. They arranged to meet again on August 20 with Charles Walsh. ([Deleted])

On the same day, Errichetti told DeVito and Weinberg that Representative Myers was ready at any time. DeVito told Errichetti that Myers would "have to introduce some kind of legislation, right, some kind of bill or something," to which Errichetti replied, "Whatever you say." (*Myers* Gov't Trial Ex. 4A, at 1.) Errichetti said that Senator [deleted] was reluctant to meet with them because of his existing legal problems. (*See id.* at 2.)

Sandy Williams visited DeVito and Weinberg on August 8 to receive his shares of the titanium venture stock. Sandy Williams said that Senator Williams was willing to accept $20,000 for expenses, but only if delivered through him. DeVito and Weinberg told Sandy Williams that the $20,000 would have to be given directly to Senator Williams. ([Deleted]) This conversation was not recorded.

On August 9, a conference was held at the home of Special Agent Lawrence Schneider, among Special Agents Schneider, Amoroso, Bruce Brady, Ernest Haridopolos, and Martin Houlihan, Weinberg, and two Assistant United States Attorneys from New Jersey, Edward J. Plaza and Robert A. Weir, Jr. Plaza had met with Weir and Houlihan in advance of the others' arrival to discuss his concern that Abscam lacked adequate controls. According to Plaza, when the undercover agents arrived with Weinberg, the New Jersey prosecutors attempted to debrief them and found that the agents could not recall conversations or participants in meetings. Plaza has testified that he and Schneider criticized Amoroso for not having memorialized events and insisted that Weinberg record all conversations and that, if recording were not possible, an agent debrief Weinberg and prepare a written report. (*Myers* D.P. Tr. 872–80.)

The attorneys also addressed the June 28, 1979, Williams "coaching session." Plaza has testified that he told Amoroso "that we couldn't possibly tolerate that kind of conduct." (*Id.* at 877.) Plaza has stated that he argued that Weinberg was "putting words into peoples' mouths. And you can't tell somebody what it is you're going to say and afterwards prosecute him for it." (*Id.*) Plaza and Weir recall Weinberg's having protested that, unless they told people what to say, they would not have any cases. (*See id.* at 877–78; *Lederer* Trial Tr. 933.) Plaza testified that Weinberg had claimed that Strike Force attorney Sharf had guided him on what to say. Plaza also testified that Weinberg, Amoroso, and Haridopolos had expressed regret that the incident had been recorded, not that it had occurred. (*Myers* D.P. Tr. 878.)[89]

---

[88] The controversy over what Myers and other public officials were led to believe about the skeik's needs and plans is discussed at length at pp. 172–204 *supra*.

[89] Former Brooklyn Strike Force attorney Jacobs has disputed Plaza's and Weir's representations that they had discovered the coaching session and were the first to criticize the FBI undercover agents and Weinberg for it. (Sel. Comm. interview of John A. Jacobs, July 23, 1982.)

On August 15 Weinberg and Errichetti discussed Representative Myers' impending meeting with the sheik and arranged to meet Myers beforehand to brief him on his conduct at the meeting. (*See Myers* Def. Trial Ex. T-5, at 3-5.)

On August 20, DeVito, Weinberg, Errichetti, Cuti, and Charles Walsh met at the Plaza Hotel. Walsh agreed to make a payment of $10,000 to Errichetti on August 22. Weinberg offered DeVito's services as bagman to Errichetti for the payment. ([Deleted]) Bowe-Walsh had apparently previously allocated to Errichetti $20,000 of a $40,000 kickback for the Camden sewer system contract, but the money had never reached Errichetti. ([Deleted]) On August 21 the New York Field Office requested from FBI HQ $10,000 cash, which DeVito as bagman was to substitute for the $10,000 that Cuti and Walsh would deliver for Errichetti, so that the FBI could retain the cash from Cuti and Walsh as evidence and attempt to recover fingerprints. ([Deleted])

The same teletype informed FBI HQ that the meeting with Congressman Myers was confirmed for August 22. The teleype stated that Puccio had recommended payment of a $50,000 bribe, if the requisite commitments were forthcoming, and that Errichetti had said that Myers would take a bribe in return for a promise to assist the sheik. ([Deleted]) It also requested authority to give $2,000 to Alexander Alexandro, Jr., on August 22.[90] ([Deleted]) Both requests were granted. ([Deleted])

On the evening of August 21 Johanson visited Myers' home to make arrangements for the meeting scheduled for the next day. Johanson told Myers that he would be briefed by Errichetti and Weinberg before the meeting with the sheik. (*See Myers* Trial Tr. 2713-15.)

On August 22, 1979, Myers and Johanson met Criden and Errichetti at Kennedy Airport. Errichetti proceeded to the Travelodge International Hotel, where the meeting was scheduled to occur, followed by Criden and Johanson. (*See Id.* at Tr. 1145-48, 1391-93, 3090-98.) Weinberg left the hotel room, where DeVito was waiting for Myers, and met Errichetti alone in the hotel lobby. (*See id.* at 1650.) Errichetti has maintained that Weinberg told him in this conversation to tell Myers to "playact." [91] Weinberg has testified that he met Errichetti to tell him only that the bribe payment had been reduced from $100,000 to $50,000. (*Id.; see* Sel. Comm. Hrg., Sept. 16, 1982, at 129-30 (testimony of Melvin C. Weinberg).) The conversation was not recorded. Weinberg returned to the hotel room, where he and DeVito were shortly joined by Myers and Errichetti. The meeting was videotaped. (*See Myers* Gov't Trial Ex. 5A.)

Errichetti introduced Myers, who described his role in the House of Representatives. (*See id.* at 1-2.) After DeVito outlined the asylum scenario, Myers responded, "Where I could be of assistance in this type of matter, first of all, is private bills that can be introduced. * * * With me in his corner, his chances are one hundred percent better than they would be without somebody like me in his corner." (*Id.* at 3-5.) DeVito stated, "Well, that's why we, why we're puttin' up this kind of money. All right?" (*Id.* at 6.) Myers replied, "Absolutely. * * * I got the clout to introduce legislation." (*Id.*) "[Y]ou're goin' about it the right way * * * I'm gonna tell you something real simple and short. Money talks in this business and bullshit walks. And it works the same way down in Washington." (*Id.* at 11-12.) Myers also assured DeVito that he would contact key State Department officials.

Myers suggested that the Arabs' immigration prospects would be enhanced if they invested in the United States and that investment in his Congressional district would provide a rationale for Myers' support of their cause. (*Id.* at 17-18.) DeVito agreed that they should protect Myers. (*Id.* at 18, 28-29.) DeVito offered Myers an envelope containing $50,000 and commented, "Spend it well." Myers accepted the envelope and responded, "Pleasure." (*Id.* at 29.) The meeting terminated, and Errichetti escorted Myers to the lobby.

Myers handed the envelope to Errichetti, and Myers and Johanson drove to Philadelphia. Errichetti returned to the hotel room to meet with DeVito and Weinberg. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 201 (testimony of Angelo J. Errichetti).) They discussed the next Congressmen who would agree to participate. (*See Myers* Gov't Trial Ex. 6A, at 4-5.) Errichetti complained about the sudden reduction in Myers' bribe payment, but agreed to make arrangements for other Congressmen for $50,000 each. (*See id.* at 11-17.) Errichetti also promised that he would produce a State Department official who was more powerful than the person Myers had in mind. (*See id.* at 11.)

---

[90] The meeting with Alexandro took place on August 23. (*See* p. 432 *infra.*)

[91] The controversy surrounding Myers' "playacting" allegations is discussed at length at pp. 178-93 *supra.*

Errichetti returned to Kennedy Airport, where he met Criden. Errichetti testified that he removed $15,000 and gave the envelope with the balance of the money to Criden. (*See* Sel. Comm. Hrg., Sept. 15, 1982, at 201-03 (testimony of Angelo J. Errichetti).) Criden returned to his law firm, where he spoke with his partner, Ellis Cook. Criden told Cook that there had been only $50,000, of which Errichetti had taken $15,000, and decided to take $10,000 and to tell Myers that there had been only $25,000. (*See Myers* Trial Tr. 1150-51.) Myers and Johanson arrived and divided the remaining money with Criden. Myers took $15,000; Cook received $4,500; Criden received $9,000 or $9,500; and Johanson took the remaining $6,500 or $6,000. (*See Id.* at 1151-53, 2740-42.)

On August 23 DeVito and Weinberg met with Alexandro at the Travelodge International Hotel at Kennedy Airport. At the meeting Alexandro described a detailed plan for avoiding immigration restrictions. (*See Alexandro* Gov't Trial Ex. 10A, at 1-6.) Alexandro stated that the entire operation would cost $15,000. (*Id.* at 7.) DeVito offered $2,000, which Alexandro accepted. They agreed that Alexandro would receive an additonal $13,000 when the transaction was completed. (*Id.* at 15-16; *see id.* at 17-24.) Alexandro left with the $2,000 and did not meet with DeVito or Weinberg again.

On August 24 Weinberg, DeVito, and William Rosenberg met at the International Hilton Inn at Kennedy Airport. Rosenberg proposed producing fraudulent gold certificates. (*Kelly* Gov't Trial Ex. 4C, at 2.) Rosenberg also suggested that he work for Abdul Enterprises, and stated, "[I]f what we need is to develop political clout in a state or in a city, I'll get the people who'll bring it to us." (*Id.* at 6.) Weinberg responded that Abdul Enterprises wanted to prepare for the possibility of casino gambling in New York and suggested that Rosenberg begin attempting to locate politicians who would agree to assist Abdul Enterprises. (*See id.* at 7-8.) Rosenberg agreed and suggested that he introduce Weinberg and DeVito to Stanley Weisz, a Long Island accountant, who would assist both in manipulating their funds and in contacting politicians. (*See id.* at 9-11.)

On August 30 the FBI held a conference near Valley Forge, Pennsylvania, at the request of Edgar N. Best, Special Agent in Charge of the Philadelphia Field Office, to discuss the involvement of public officials from Philadelphia. (*Jannotti* Pre-trial D.P. Tr. 5.31-.33.) Present were supervisors from FBI headquarters, and Special Agents Good, Amoroso, Haridopolos, Schneider, and Best. Four priorities were established for the undercover operation: (1) a contemplated payoff to [deleted] Mayor [deleted]; (2) a September 11 bribe meeting with Representative Lederer; (3) acquisition of a condominium to develop the Atlantic City area through Errichetti; and (4) development of Casino Control Commission contacts through Kenneth MacDonald. ([Deleted])

Best testified that he had urged that an offshoot of Abscam be organized in Philadelphia, but that the proposal was not acted upon at that time. He and Peter Vaira, United States Attorney for the Eastern District of Pennsylvania, sought to orchestrate the Philadelphia portion of Abscam in order to investigate allegations that Philadelphia organized crime leader Angelo Bruno controlled Atlantic City casino construction through his influence in the building trades. (*See Jannotti* Pre-trial D.P. Tr. 5.32-.35, 5.78-.79.)

SEPTEMBER 1979

In early September, Errichetti and Weinberg arranged a meeting to offer a bribe to Representative Lederer, whom Johanson had contacted. (*See Lederer* Gov't Trial Exs. 9A, 10A, 11A; *Lederer* Trial Tr. 904-05.) During that time Sandy Williams, Senator Williams, and Feinberg discussed the proposed resale of the titanium enterprise. (*See Wms.* Trial Tr. 1638.) Feinberg and Weinberg scheduled a shareholders' meeting for September 11. ([Deleted]); *Wms.* Trial Tr. 4028-31.

On September 6 a request was made within the FBI to use Special Agents Amoroso and Farhart, along with *The Left Hand,* in an unrelated undercover operation concerning the activities of fugitive financier Robert Vesco and a number of corrupt middlemen. ([Deleted])[92]

Weinberg met Rosenberg on September 10 at the JFK Hilton to discuss Rosenberg's progress with politicians. Roseberg claimed that the had contacted [deleted]

---

[92] The request was approved and resulted in a meeting on September 20, 1979, among DeVito, Democratic Party Chairman John White, and middleman James C. Day, Jr. Because White did not make appropriate guarantees no bribe funds were offered in this non-Abscam event. (*See* Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr., at 7 (Nov. 8, 1982).)

Senators [deleted] and [deleted] and Representative [deleted]. *(See Kelly* Gov't Trial Ex. 5C, at 1-3.) Weinberg outlined the asylum scenario, and Rosenberg indicated that the politicians would not be available for several weeks. *(See id.* at 2-5.) Rosenberg also alluded to other possible Congressional participants. Weinberg stated that Abdul Enterprises wished to pursue both [deleted] Senators, and Rosenberg promised to arrange meetings between them and DeVito.[93] *(See id.* at 5-7, 12.) Rosenberg also scheduled a meeting for Weinberg and DeVito with Weisz, whom he described as connected with organized crime. *(See id.* at 7-10.)

On September 11 Representative Lederer flew to LaGuardia Airport, where he was met by Criden and Johanson, who introduced him to Errichetti. Errichetti and Lederer drove to the International Hilton at Kennedy Airport, followed by Criden and Johanson, who remained in the hotel cocktail lounge. *(See Lederer* Trial Tr. 658-61, 828-29.) After Errichetti introduced Lederer to DeVito and Weinberg, Weinberg said to Lederer, "Ah, Angie must have explained to you." Lederer replied, "He told me some things you're interested in and, ah, we're on the same vibes." *(Lederer* Gov't Trial Ex. 12A, at 3.) Weinberg and DeVito presented the asylum scenario and asked Lederer about private legislation. Lederer responded, "Private bill, sure." (*Id.* at 2-5.)

Repeating the theme that Myers had advanced, Lederer emphasized that the sheik's investments in Philadelphia would explain his introduction of a private immigration bill on the sheik's behalf. *(See id.* at 6-8.) After Lederer discussed the actions he would take to ensure passage of private legislation *(see id.* at 13-16), DeVito handed him a brown paper bag containing $50,000. (*See id.* at 35.) Lederer left with the paper bag, rejoined Criden and Johanson, and departed with them. *(See Lederer* Trial Tr. 829-30.)

The following morning Criden met his partner Ellis Cook in Philadelphia. Criden gave Cook $4,500 as his share of the bribe and gave him an envelope containing $5,000 to be placed in a safe deposit box for Lederer.[94] Criden told Cook that Errichetti had taken $20,000 and that the balance would be divided with $5,000 going back to Weinberg and DeVito. (*See id.* at 663-65.)

On the evening of September 11, DeVito, Weinberg, Errichetti, Senator Williams, Feinberg, Katz, and Sandy Williams met at the International Hilton. (*See Wms.* Gov't Trial Ex. 23A, Sen. Comm. Print, Pt. 6, at 208.) Discussion focused upon the proposed resale of the titanium venture and the redistribution of the retained shares of stock, both of which were approved unanimously. (*See id.*)[95] Senator Williams confirmed that the same premises that had led to the formation in July of the titanium venture's corporate structure—his assistance in getting government titanium contracts—would continue on behalf of the new group of investors. (*Id.* at 54, Sen. Comm. Print, Pt. 6, at 261.)

On September 12 DeVito and Weinberg met Rosenberg and Stanley Weisz at the International Hilton at Kennedy Airport. ([Deleted]) Weisz agreed to assist in the production of fraudulent gold certificates for 10,000 ounces of gold. ([Deleted]) Rosenberg stated he would have the certificates printed, and the parties agreed to remain in contact. ([Deleted])

Errichetti and Weinberg spoke by telephone twice on the morning of September 14. During the first conversation Weinberg told Errichetti that Abdul Enterprises could accommodate the three public officials whom Errichetti had offered: Senator [deleted], Representative [deleted], and a third official whose name he asked Errichetti to provide. ([Deleted]) When they spoke for the second time, Errichetti identified the third official as the "Commissioner of Naturalization and Immigration," whom he named as Mario T. Nopo [sic]. (*Myers* Def. Trial Ex. T-9.) They discussed arrangements for the bribe meetings with the three officials. (*See id.* at 2-6.)

That evening Errichetti gave Weinberg, DeVito, and Bradley (Special Agent Bruce Brady) a forged letter dated September 11, 1979, over Senator Williams' signature, purporting to state Senator Williams' willingness to assist the new owners of the titanium enterprises. (*See* [Deleted), *reprinted in* 128 Cong. Rec. S 1510 (daily ed. Mar. 3, 1982); [Deleted]) Errichetti had provided this letter, to which his secretary had forged Senator Williams' signature, in response to Weinberg's request that Errichetti obtain an authentic letter from Senator Williams demonstrating to the new Arab consortium Senator Williams' agreement to assist the project. ([Deleted], *reprinted in* 128 Cong. Rec. S 1510 (daily ed. Mar. 3, 1982); [Deleted], *reprinted* in 128 Cong. Rec. S 1510 (daily ed. Mar. 3, 1982).)

---

[93] In subsequent conversations Rosenberg continued to stall on scheduling meetings with the members of Congress whom he had named ([Deleted])

[94] Cook and Johanson deposited Lederer's share that same day. *(See Lederer* Trial Tr. 665-67; *Lederer* Gov't Trial Ex. 17.) Approximately two weeks later, Cook withdrew the funds, at Johanson's directive, for transmittal to Lederer. *(See Lederer* Trial Tr. 667-73; *Lederer* Gov't Trial Exs. 17, 18.)

[95] The controversy over the size of the profit to Senator Williams from the resale is discussed at pp. 235-37 *supra*.

The conversation shifted to arrangements and scheduling for a bribe meeting with Congressmen. Errichetti said that on September 19 Atlanta Attorney Corbett Peek would introduce him to Representative [deleted] and that he intended to take [deleted] to meet Weinberg and DeVito the same day.[96] ([Deleted]) Errichetti stated that they could also meet the INS official on September 19 ([Deleted]) Weinberg asked Errichetti which officials they would meet after September 19 ([Deleted]) Errichetti responded, "There's two more from Georgia * * *. Now this is what I was told * * * by Peek * * *. At least two from Georgia, two from Florida, California. He says, you know, 'You tell me when to stop.' I said, 'I will tell you when to stop. Right now, go, right.' " ([Deleted]) Errichetti said that Peek estimated that a minimum of ten additional Congressmen "from all parts of the country" would participate. ([Deleted])

Later in the discussion, Weinberg asked Errichetti if he knew Hamilton Jordan, Assistant to President Carter. Errichetti responded that he did not know Jordan personally, but Weinberg nevertheless asked Errichetti to "reach out." Weinberg explained that he wanted to find "someone to get close to (inaudible) Vesco." DeVito objected: "No, no, no. I just want to stay away from that." ([Deleted]; *see* pages 63-64 *supra.*)

In fact, Errichetti and Criden did not know anyone in the Immigration and Naturalization Service, including INS Deputy Commissioner Noto. Errichetti and Criden decided to have Ellis Cook impersonate Noto in the meeting with DeVito and Weinberg on September 19. (*See Myers* Trial Tr. 1293-94.) On or about September 16, Criden introduced Cook to Errichetti, and arrangements were made for the forthcoming meeting. (*See id.* at 1233-37, 1311-16; Sel. Comm. Hrg., Sept. 14, 1982, at 65 (testimony of Howard L. Criden).)

During a telephone conversation on September 16, Errichetti informed Weinberg of an opportunity to purchase land in Atlantic City through Joseph Silvestri. ([Deleted]) On the evening of September 17, Weinberg and Errichetti met with Silvestri to discuss the proposed project. ([Deleted])

On September 18 Errichetti and Weinberg made arrangements for the Noto meeting the following day. (*See Myers* Def. Trial Ex. T-10.) Errichetti told Weinberg that Peek had telephoned to cancel the meetings with Senator [deleted] and Representative [deleted]. Errichetti said that Peek had explained that there had been a death in [deleted] family and that [deleted] was "reassessing his position" and would "get back to [Peek] as to when he wants to chat.* * *" ([Deleted]) The same day Weinberg discussed the cancellations with Criden. (*See Thompson* Def. Trial Ex. MC, at 1, 4.) Weinberg asked what other public officials Criden had lined up. Criden responded, "Who do you want? Within reason I can produce almost anybody you want." (*Id.* at 1.) Criden asked, "Would you like some Governors? * * * Congressmen, Senators, Governors, what else?" (*Id.* at 2.) Criden stated that he knew a dozen public officials, inquired if Weinberg was interested in California politicians, and mentioned as possibilities an official from Texas and a State Department official. (*See id.* at 2, 13-14.) Weinberg responded, "Let's run with it until it stops." (*Id.* at 13.)

On September 19 Errichetti and Cook, who was impersonating Noto, met DeVito and Weinberg at a townhouse at 4407 W Street, N.W., in Washington, D.C. (*See Myers* Def. Trial Ex. T-16.) The FBI had rented the townhouse for use in another undercover operation and had decided to begin using it in Abscam. ([Deleted]; *see* pages 329-32 *supra.*) The FBI special agents had obtained Noto's photograph, from which DeVito immediately detected Cook's impersonation. (*See Myers* Def. Trial Ex. T-16; [deleted]; *Myers* Trial Tr. 1348, 1362-71.) After a brief discussion of immigration procedures, Weinberg and DeVito told Cook and Errichetti that the knew Cook was not Noto. (*See Myers* Def. Trial Ex. T-16; [Deleted]) After Cook left the room, Errichetti said that he did not know who had been responsible for the fraud. ([Deleted]) *Myers* Gov't Trial Ex. 23A, at 2-7.)

On September 20 Criden told DeVito and Weinberg that he had heard what had happened the previous day. ([Deleted]) Criden stated that Errichetti's INS contact had perpetrated the fraud without Errichetti's knowledge. ([Deleted]) DeVito and

---

[96] Criden had contacted Peek, with whom he had previously conducted legal business, sometime in the late summer of 1979, to ask if he knew any members of Congress who might agree to meet Weinberg and DeVito. (*See* Sel. Comm. Hrg., Sept. 14, 1982, at 36-46 (testimony of Howard L. Criden).) Peek had named Senator [deleted] and Representatives [deleted] and [deleted] as prospects. (*Id.*).

Criden agreed that they would continue to participate in payoff transactions. ([Deleted])[97] On September 21 DeVito, Weinberg, Errichetti, and Criden met Silvestri and the owner of the Atlantic City property that Silvestri had proposed that Abdul Enterprises finance to discuss the project. ([Deleted])

On September 24 Criden told Weinberg that he was trying to arrange meetings with two Congressmen for the following week and that he thought that he would have additional Congressmen later. ([Deleted]) Over the following few days, Criden, Errichetti, and Weinberg frequently discussed arrangements and procedures for the next round of payoff meetings. ([Deleted]) On September 26 Weinberg elicited assurances from Criden that Criden had previously conducted business with the candidates to whom he was introducing the sheik's representatives. (*See Thompson* Def. Trial Ex. ME, at 2; [Deleted].) Criden stated that "the guy in Texas" was ready to participate, but that he "would prefer me or somebody else picking up the envelope. * * * When he leaves, right, he don't want to handle any of that; he wants it done through somebody else." (*Thompson* Def. Trial Ex. ME, at 3; *see id.* at 3-8.) Weinberg stated that he thought that transfer of the money to Criden in the presence of the public official would be acceptable, but that he needed to confer with DeVito. (*See id.* at 5-9.) Later that day, Weinberg told Criden that the "new way" was acceptable. (*See Thompson* Def. Trial Ex. MD, at 2-4.) Criden responded that he then would be able to produce two or three politicians the following week. Criden named Representative [deleted], from whom he said he had a "tentative commitment." (*See id.* at 2-5.) Criden also stated that [deleted] might be available the following week and that Senator [deleted] was still a possibility. (*See id.* at 5, 7.) Weinberg expressed a preference for handling [deleted] "the old way," while Criden stated that [deleted] might insist upon indirect payment. (*See id.* at 5-6.)

On September 27 Criden told Weinberg that, in addition to [deleted] he thought that he would be able to produce [deleted] and Representatives [deleted] and Thompson from New Jersey. (*See Thompson* Gov't Trial Ex. 1A, at 1-4; [Deleted]) Criden had obtained the names of these three politicians from Silvestri that morning. (*See* Sel. Comm. Hrg., Sept. 14, 1982, at 91-92 (testimony of Howard L. Criden); *Thompson* Trial Tr. 1231-34; David Dir interview of Joseph Silvestri, Nov. 5, 1981); [Deleted]) Criden met Weinberg and DeVito in Florida on September 29. ([Deleted]) Criden reported that [deleted] and Representatives Thompson and [deleted] would accept payoffs. ([Deleted]) The New York Field Office planned to arrange meetings with Thompson and [deleted] on October 3 in New Jersey. ([Deleted]) There is no recording and no 302 of the September 29 meeting. On October 2, FBI HQ recommended approval for a $100,000 expenditure for bribes to [deleted] and to Thompson. ([Deleted])

OCTOBER 1979

On October 2, however, Criden told Weinberg that [deleted] would be unwilling to meet outside his office or to acknowledge the receipt of money. (*See Thompson* Gov't Trial Ex. 2A, at 2-5.) Weinberg told Criden that he did not want to meet [deleted] under those conditions. (*See id.* at 2-7.) Therefore, no meeting was held with [deleted]. Criden agreed to inform Weinberg of arrangements with Thompson and [deleted]. (*See id.* at 4-5; [Deleted])

On October 3 Errichetti told Weinberg that he was angry because he had not known about the approach to [deleted], whom he called his "man." (*See Myers* Gov't Trial Ex. 24A, at 1.) Further, Errichetti complained that he had learned from Criden that Weinberg had told Criden that he thought Errichetti had been responsible for the Noto impersonation. (*See id.* at 2-6.) Weinberg denied having blamed Errichetti for the Noto incident. (*See id.*) On the next day Weinberg admitted to Criden having told Criden that he suspected Errichetti but objected to Criden's having related this to Errichetti. (*See Myers* Gov't Trial Ex. 25A.) Weinberg told Criden to forget about the Noto debacle. (*See id.*)

On October 4 Silvestri introduced Criden to Thompson at Thompson's office in Lawrenceville, New Jersey. (*See Thompson* Trial Tr. 2275-91, 2397-414; *Thompson* Def. Trial Ex. TI.)[98] Later that day, Criden told Weinberg that Thompson and [deleted] were prepared to participate, and he arranged for them to meet Weinberg and DeVito on October 9. (*See Thompson* Gov't Trial Ex. 3A, at 1-2; [Deleted]; *Thompson* Gov't Trial Exs 4A; 5A, at 3; 6A, at 1-2.) Criden told Weinberg that "to convince these guys [members of Congress] to do this number is not as easy as you think it is. * * * I got to talk to eighty guys before you grab two or three that are even interested in doing something." (*Thompson* Gov't Trial Ex. 3A, at 3-4.)

---

[97] The Select Committee found no evidence indicating that the FBI had attempted to learn who the impersonator had been.

[98] The FBI did not learn until October 18 that Thompson and Criden had not met before October 4 ([Deleted])

A document prepared by the New York Field Office on October 5 stated that tentative arrangements had been made for $50,000 payoffs to Representatives Thompson and [deleted]. ([Deleted]) On October 9, 1979, FBI HQ officials approved the bribe meeting with [deleted]. ([Deleted]) Thompson had previously been approved.

On October 5 Silvestri met with DeVito and Weinberg in New York. In the course of a protracted discussion of New Jersey politics, Silvestri identified Representative [deleted] and New Jersey State Senator [deleted] as public officials with whom Abdul Enterprises could "make a deal." ([Deleted]) At one point Silvestri described [deleted] as "the guy who holds Congressman [William J.] Hughes [from New Jersey] down so he don't go too crazy." ([Deleted]) [99] Later in the meeting Weinberg told Silvestri that he wanted to meet [deleted] Mayor [deleted]. ([Deleted]) DeVito and Silvestri spoke by telephone on the evening of October 5. They arranged for Silvestri to take [deleted] to meet DeVito and Weinberg in Washington on October 10. ([Deleted])

In another meeting on October 5, George Katz discussed with DeVito and Weinberg a pending grand jury investigation of [deleted] Mayor [deleted]. ([Deleted]) Katz explained that the investigation had been the source of his earlier reluctance to introduce [deleted] to DeVito and Weinberg. ([Deleted]) Katz suggested that United States Attorney for the District of New Jersey Robert Del Tufo might assist [deleted]. ([Deleted])

On October 7 DeVito, Weinberg, Feinberg, and Senator Williams met at the Plaza Hotel in New York. (*See Wms.* Gov't Trial Ex. 24A, Sen. Comm. Print, Pt. 6, at 289.) During the course of a conversation about potential loans for casino projects and million-dollar finder's fees for Senator Williams and Feinberg, the Senator and Feinberg recounted how they had influenced a decision by the Casino Control Commission to approve the building plans for the proposed Ritz-Carlton casino. Feinberg stated that he had contacted Kenneth MacDonald, Vice Chairman of the New Jersey Casino Control Commission, and had asked him to use his influence on behalf of the Ritz-Carlton. Feinberg said that MacDonald had contacted him later and had told him not to be concerned. When DeVito asked whether the Senator was planning to disclose his interest in the titanium venture, both Senator Williams and Feinberg stressed that they would do nothing to hamper the resale and would find some way to conceal the Senator's interest. (*Id.* at 30-50, Sen. Comm. Print, Pt. 6, at 318-38.) [100]

Early in the afternoon of October 9, 1979, Criden took Thompson to meet DeVito and Weinberg at the W Street townhouse in Washington, D.C. (*See Thompson* Gov't Trial Ex. 7A-1.) [101] Weinberg outlined the asylum scenario and said to Thompson, "Howard said you could do something for us." (*Id.* at 6.) Thompson stated that private immigration legislation was difficult to pass. (*See id.* at 8-12.) DeVito stated, "Well, that's what the money is for. * * *" (*Id.* at 13.) Thompson replied, "Well, I'm not looking for any money. * * *" (*Id.*) DeVito told Criden to take Thompson back to his office and then to return to the townhouse. (*See id.* at 25-26.) Criden returned to the townhouse alone.[102] (*See Thompson* Gov't Trial Ex. 7A-2.) DeVito told him that he had not received a satisfactory commitment from Thompson and that Thompson had said that he did not want money. (*See id.* at 1-3.) Criden objected that Weinberg had agreed that money would not be discussed in Thompson's presence, but that Thompson expected to receive the money. (*See id.* at 1-15, 22-25.) DeVito and Criden agreed that Criden would attempt to convince Thompson to return to the townhouse with him and to accept the briefcase containing $50,000 from DeVito, provided that there were explicit references to the money. (*See id.* at 27-33; *Thompson* Gov't Trial Ex. 7A-3, at 2-3; *Thompson* Gov't Trial Ex. 7A-4, at 2.) Criden told DeVito and Weinberg that his understanding with [deleted] had also precluded references to money. (*See Thompson* Gov't Trial Ex. 7A-2, at 5, 14, 16.) Therefore, Criden cancelled the appointment with [deleted] scheduled for that afternoon. (*See id.* at 47-48; *Thompson* Gov't Trial Ex. 7A-3, at 3-4.)

Criden returned to Thompson's office to discuss the new ground rules. (*See id.* at 1-3, 5.) Criden and Thompson returned to the townhouse in the early evening. (*See Thompson* Gov't Trial Ex. 7A-5.) [103] Criden told DeVito, "Frank understands the situation, Ton." (*Id.* at 1.) DeVito said to Thompson, "I just want to make sure that, you know, you understand. There's the briefcase." (*Id.*) Thompson said to Criden, "You look after that for me, will you?" (*Id.* at 2.) After explaining their respective reasons for being cautious in the earlier meeting (*see id.* at 2–3, 8), Thompson, Criden, and DeVito discussed the possibility of Thompson's introducing other Congressmen to DeVito. (*See id.* at 2, 9.) Thompson told DeVito, "I would brief people," and added, "[t]he first guy you might see might well be a pal of mine from New York. * * *" (*Id.* at 10.)[104] As Thompson and Criden rose to leave, they simultaneously grabbed the briefcase. Thompson relinquished it, and Criden carried the briefcase from the room. (*See id.* at 13.) On October 10 Criden told Cook that Thompson had received his share of the money during the ride back to the Capitol. (*See Thompson* Trial Tr. 1243–47.)

---

[99] The controversy surrounding this mention of Hughes is discussed at pp. 60-61 *supra*.

[100] The October 7 meeting is discussed in detail at pp. 226-29 *supra*.

[101] For a detailed discussion of this meeting, see pp. 267-68 *supra*.

[102] This meeting is discussed extensively at pp. 268-70 *supra*.

[103] The controversy concerning the events of this meeting is discussed in detail at pp. 270-77 *supra*.

On October 10 Representatives Thompson and John Murphy met in Murphy's office. (*See id.* at 1706–08.) That evening Weinberg told Criden to make arrangements for the next official. (*See Thompson* Gov't Trial Ex. 8A, at 3.) Criden stated that Thompson's friend from New York would be next, but, although Criden accurately described Murphy, he erroneously identified him as Ryan. (*See id.* at 5–6.)

Also on October 10 Silvestri drove New Jersey State Senator [deleted] to the W Street townhouse, where they met Weinberg. ([Deleted]) Weinberg told [deleted] of Abdul Enterprises' interest in paying politicians to assist in obtaining casino licenses and in passing jai alai legislation in New Jersey. ([Deleted]) Weinberg also asked [deleted] about his relationship with Representative [deleted] and outlined the asylum scenario. ([Deleted]) [deleted] explained how to influence public officials through offers of jobs and campaign contributions. ([Deleted]) Weinberg told [deleted] that there was money for him, but that DeVito would have to give it to [deleted]. ([Deleted]) Weinberg, [deleted], and Silvestri scheduled another meeting with DeVito for October 19. ([Deleted]) In a telephone conversation later that day, Silvestri told Weinberg that he would arrange to introduce Representative [deleted]. ([Deleted])

Over the following few days, Criden and Weinberg scheduled a meeting with Murphy in New York on October 20. ([Deleted]); *Thompson* Gov't Trial Exs. 9A, 10A, 11A; 12A, at 1, 4–5.) Errichetti told Weinberg that he was also involved in arranging the Murphy meeting. ([Deleted]) On October 17 Criden told Weinberg that he would arrange for a meeting with another politician a few days after the Murphy meeting. (*See Thompson* Gov't Trial Ex. 12A, at 3–4.)

Weinberg received an increase in his monthly stipend from $3,000 to $5,000 per month on October 15. ([Deleted])

Weinberg met Silvestri at the Hilton Inn in Mount Laurel, New Jersey, on October 17. ([Deleted]) Silvestri told Weinberg that on September 27 Criden had offered him money to produce Congressmen for Abdul Enterprises. ([Deleted]) Silvestri told Weinberg that Criden had given him $3,500 because he had introduced Criden to Thompson, but that he had not understood the purpose of the introduction. ([Deleted]) Silvestri said that he had also tried to arrange a transaction with Representative [deleted]. ([Deleted]) Weinberg explained the asylum scenario and the ground rules for payoffs. ([Deleted]) Silvestri said that he would produce [deleted], and that he might be able to produce Senator [deleted]. ([Deleted]) Silvestri stated that he would try to arrange a meeting that weekend with Representative [deleted] or Representative [deleted]. ([Deleted]) Silvestri confirmed Weinberg's plans to pay [deleted] the following day. ([Deleted]) Weinberg asked Silvestri if he could produce Representative Hughes, whom Silvestri had mentioned in passing on October 5. ([Deleted])[105]

On October 17 the FBI New York Field Office informed FBI HQ of meetings scheduled with Representative [deleted] on October 19 and with Representative Murphy on October 20 and requested authorization to offer each Congressman a $50,000 bribe. ([Deleted]) FBI HQ authorized payment of the bribes to [deleted] and to Murphy the following day. ([Deleted]) An addendum to the request for authorization to offer the bribes stated that Silvestri had told DeVito and Weinberg that he might bring [deleted] or [deleted] instead of [deleted] and requested authorization for these payments. ([Deleted]) Payments to these Congressmen were approved. ([Deleted]) The approval document stated, "inasmuch as authorization has been granted to expend $50,000 for the purpose of a bribe to [deleted], ITSP-Transportation Crimes Unit recommends that this authorization be extended to include not only

---

[104] Thompson testified at trial that he had been referring to Representative John Murphy. (*See Thompson* Trial Tr. 2482.)

[105] For a discussion of Weinberg's request that he meet Hughes, see pp. 60–61, 75 *supra*.

[deleted], but Hughes and [deleted], it being noted that only one payment to one Congressman will be made." ([Deleted])[106]

DeVito, Weinberg, Silvestri, and [deleted] met in Ventnor, New Jersey, on October 18, 1979. ([Deleted]) DeVito told [deleted] that Abdul Enterprises wanted to guarantee support for licensing of its casino interests. ([Deleted]) [deleted] suggested that his law firm represent Abdul Enterprises overtly. ([Deleted]) DeVito stated that [deleted] would be able to help only if their relationship were not known publicly. ([Deleted]) Weinberg and Silvestri left DeVito and [deleted] to talk privately. ([Deleted]) DeVito asked [deleted] how much money he wanted. ([Deleted]) [deleted] replied, "I don't want any figure * * * This business of the envelope, if you want to give something, you want to give it to Joe, that's fine, * * * it doesn't bother me." ([Deleted]) DeVito stated, "I was under the understanding, * * * that * * * I was gonna give you the money today." ([Deleted]) [deleted] replied, "I'd appreciate it if you didn't give me any money. I'm not here just to grab an envelope." ([Deleted]) [deleted] said that, to help Abdul Enterprises, he would need some money to give to other politicians but that for himself he wanted an eventual interest in the casino. ([Deleted]) Silvestri entered, and [deleted] exited. ([Deleted]) DeVito told Silvestri that [deleted] had refused the offer of money. ([Deleted]) Silvestri said that [deleted] wanted the money, but that he wanted Silvestri to accept it. ([Deleted]) Silvestri left and returned with [deleted]. DeVito gave Silvestri the money in [deleted] presence ([Deleted]) [deleted] repeated that he was more interested in future involvement in Abdul Enterprises' business than in money but that money would enable him to pay off other politicians. ([Deleted])

While [deleted] was not in the room, Silvestri told DeVito that he would introduce him to Representative [deleted] on October 20. ([Deleted]) Silvestri recounted Criden's request that Silvestri introduce him to Congressmen, Silvestri's subsequent conversations with Thompson and [deleted], and his introduction of Criden and Thompson. On October 19 Silvestri confirmed with Weinberg the appointment with [deleted] the next day. ([Deleted]) Also on October 19 Thompson introduced Criden to Murphy in Washington, D.C. Criden and Murphy made arrangements for Murphy's meeting with DeVito and Weinberg the next day in New York. (*See Thompson* Trial Tr. 1250, 1709-10, 2338-42.)

On October 20 Murphy and Criden met DeVito and Weinberg at the JFK Hilton in New York. (*See Thompson* Gov't Trial Ex. 13A.)[107] Weinberg and DeVito outlined the asylum scenario to Murphy. (*See id.* at 5-9.) DeVito suggested that investments by Abdul Enterprises in Murphy's congressional district would provide a cover for Murphy's assistance. (*See id.* at 10.) Criden and Murphy responded that they had envisioned Abdul Enterprises' investing in a shipping company. (*See id.* at 10-11.) DeVito and Weinberg asked whether Murphy would help. (*See id.* at 13-14.) Murphy replied, "Well, I don't think there will be any problem." (*Id.* at 14.) DeVito picked up the briefcase containing $50,000, held it out toward Criden and Murphy, and said, "Here we go. This is. * * *" (*Id.* at 19.) Criden stated, "Why don't you give that to Jack." (*Id.*) Murphy said, "Howard, why don't you take care of that." (*Id.*) Criden carried the briefcase from the room, as Murphy stated that Criden would contact DeVito about the shipping investment. (*Id.*)

Later that day Silvestri introduced Representative [deleted] to DeVito and Weinberg in the same hotel room. ([Deleted]) DeVito outlined the asylum scenario and asked [deleted] whether he could help. ([Deleted]) [deleted] said that he did not know if he could assist. ([Deleted]) Silvestri stated that he had not discussed DeVito's needs with [deleted] beforehand. ([Deleted]) [deleted] and DeVito agreed to meet again after [deleted] had considered whether he could help. ([Deleted]) [deleted] and Silvestri left. ([Deleted]) The next day Weinberg told Silvestri that he should not have brought [deleted] to the meeting if he had not agreed to help. ([Deleted]) Weinberg told Silvestri to postpone any further meetings. ([Deleted])

On October 21 Weinberg discussed the Murphy payoff with Criden. (*See Thompson* Gov't Trial Ex. 14A.) Criden stated that Thompson had introduced him to Murphy and that Murphy had been satisfied with the transaction. (*See id.* at 3.) Criden stated that Murphy had "been there before. * * * He's done this sort of a number before." (*Id.* at 6.) Criden said that he would begin arranging the next payoff. (*See id.* at 2, 6.) He stated that Senator [deleted] and Representative [deleted] were reluctant to participate. (*See id.* at 6.) Criden promised to try to arrange a meeting with [deleted]. (*See id.* at 7.)

---

[106] The approval document contained no assurance by Silvestri that [deleted] would take a bribe ([Deleted]); Sel. Comm. Hrg., July 21, 1982. at 88-89 (testimony of Francis M. Mullen, Jr.).

[107] The controversy concerning this meeting is discussed extensively at pp. 277-85 *supra*.

During a meeting with Weinberg and DeVito on October 21, Rosenberg proposed that Abdul Enterprises obtain influence by making legal campaign contributions through the Republican congressional campaign committee, instead of by paying Congressmen in cash. (*See Kelly* Gov't Trial Ex. 6-C, at 3-7.) Rosenberg said that Senator [deleted] and Representative [deleted] had recommended this procedure instead of illegal payoffs. (*See id.* at 8-15.) Rosenberg said that Senator [deleted] would not accept a bribe and that he had never returned to Senator [deleted] to discuss the issue. (*See id.* at 13-14, 17.) DeVito and Weinberg stated that the sheik wanted them to meet Congressmen personally to ensure that the Congressmen would assist but said that they would discuss Rosenberg's proposal with the sheik. (*See id.* at 4-9, 15-18.) Weinberg and Rosenberg discussed further payoffs to Congressmen on October 31. ([Deleted])

Criden told Cook on October 22 that Criden would meet Thompson to transfer Thompson's and Murphy's share of the $50,000. (*See Thompson* Trial Tr. 1251-53.) Later that week, Criden and Thompson met at the Hilton in Mount Laurel, New Jersey, and transferred the money. (*See id.* at 1253-54, 2537-38; Sel. Comm. Hrg., Sept. 14, 1982, at 78-79 (testimony of Howard L Criden).) Weinberg and Criden discussed the prospective shipping investment that Murphy had mentioned on October 20 throughout the last ten days of October. (*See e.g.*, [Deleted]; *Thompson* Gov't Trial Ex. 15A; [Deleted]; *Thompson* Gov't Trial Ex. 16A.)

Weinberg spoke with Silvestri twice on October 26. Weinberg told him to try to arrange meetings with other politicians soon. ([Deleted]) Silvestri suggested that DeVito meet [deleted] Lieutenant Governor [deleted], who he said controlled the [deleted] Congressional delegation. ([Deleted]) Weinberg asked Silvestri to arrange meetings with Representatives [deleted], [deleted], and [deleted]. ([Deleted]) Silvestri agreed to schedule [deleted], [deleted], and Lieutenant Governor [deleted], but hesitated on [deleted]. ([Deleted]) Weinberg told him to pursue [deleted] because he had already discussed Silvestri's earlier offer of [deleted]. ([Deleted]) Later that day, Weinberg and Silvestri agreed to schedule [deleted] and Hughes for November 7 and [deleted] for November 8. ([Deleted]) Weinberg reminded Silvestri to contact [deleted]. ([Deleted])

On October 30 Weinberg and Silvestri confirmed the scheduled meetings with Hughes and [deleted]. Weinberg told Silvestri that they had some problem with Lieutenant Governor [deleted], but then tentatively rescheduled [deleted] for November 9. ([Deleted]) Weinberg asked Silvestri to contact [deleted] Mayor [deleted]. ([Deleted]) Silvestri offered to introduce DeVito and Weinberg in November in Atlantic City to [deleted], [deleted] Mayor [deleted], and [deleted] Mayor [deleted]. ([Deleted]) Weinberg and Silvestri had several conversations to plan the meetings. ([Deleted])

NOVEMBER 1979

An FBI HQ document dated November 1 memorializes a conference of Abscam supervisory and operational personnel that was held on October 29 at FBI HQ. ([Deleted]) The document states, "It has been pointed out to both Goode [sic] and Amoroso that further contacts with Congressmen concerning the political asylum scenario should be terminated." ([Deleted]) [108]

FBI Supervisor Good, Special Agent Houlihan, and prosecutors Puccio and Plaza also met on November 1 in New York to discuss the impending meetings with Hughes and [deleted]. ([Deleted]) Plaza alleged that the undercover operatives had been intentionally steering the cases out of New Jersey. ([Deleted]) Good denied the charge and pointed out that the operatives had arranged to meet Representatives Thompson and [deleted] in Tom's River, New Jersey, on October 3, although neither had come. ([Deleted]) Good maintained that members of Congress were more accessible in Washington. ([Deleted]) He further observed that the FBI had obtained a condominium near Atlantic City, at which DeVito and Weinberg had paid [deleted] and which could be used to meet other suspects in the future. ([Deleted]) Plaza argued that the Hughes and [deleted] meetings should be in New Jersey. ([Deleted])

---

[108] Director Webster explained this decision:

"It was obvious that enough congressmen had been contacted to insure the introduction of private legislation and further attempts to contact additional congressmen would not appear to be what would happen in a real world situation. Therefore, the operatives were instructed not to seek out any congressmen whose names had not previously been mentioned. Moreover at this time, discussions were being held to determine if another scenario could be developed which would call for specific overt acts to be committed by predisposed politicians without involving the legislative process. We were well aware that no legislation should, in fact, be introduced for a private immigration bill as this could be subversive of the legislative process."

(Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr., at 5-6. (Nov. 8, 1982).) When asked why this directive was violated, Director Webster responded,

"By November 1, 1979, FBI Headquarters officials, as reflected in the November 1, 1979, document, had decided that no further efforts should be made to expand upon the asylum scenario. That does not mean that we did not recognize a responsibility to resolve allegations that had been made up to that point. Also, it does not mean we would ignore the leads which emerged from previous contacts with corrupt influence peddlers."

(*Id.* at 6.)

On November 6 Weinberg asked Silvestri if the meetings with Hughes and [deleted] could be moved to Atlantic City, New Jersey. ([Deleted]) Silvestri stated that it was too late to change the location of the meetings. ([Deleted]) Weinberg and Silvestri agreed that they would schedule [deleted] and Lieutenant Governor [deleted] in New Jersey the following week. ([Deleted]) They discussed plans to meet the New Jersey mayors the following week. ([Deleted]) Weinberg asked Silvestri about plans to meet [deleted]. ([Deleted]) Silvestri said that [deleted] would be difficult to meet and that Senator [deleted] would meet them but only to accept a lawful campaign contribution. ([Deleted]) Weinberg and Silvestri confirmed arrangements for the meetings the following day. ([Deleted]) Silvestri again told Weinberg that he had introduced Criden to Thompson, who had introduced Criden to Murphy. ([Deleted])

Sometime in late October or early November, Thompson approached Representative John P. Murtha, Jr., from Pennsylvania, on the floor of the House of Representatives and described his contacts with Abdul Enterprises. (*See Thompson* Trial Tr. 1818.) Over the course of that conversation and two succeeding conversations on the House floor approximately one week later, Thompson outlined the asylum scenario, described Murphy's participation, and offered Murtha an opportunity to participate. (*See id.* at 1818–20.) Murtha said that he was interested but that he would be unable to meet Criden or the sheik's representatives in the immediate future. (*See id.* at 1820–22.)

On November 6 Weinberg told Criden that he wanted to meet Murphy that weekend to discuss the shipping proposals. Criden agreed to speak with Murphy. ([Deleted]) Weinberg asked if Criden had tried to arrange a meeting with [deleted]. ([Deleted]) Criden stated that neither [deleted] nor [deleted] Mayor [deleted] would accept a bribe, but that [deleted] Mayor [deleted] would do so. ([Deleted])

Also on November 6 an FBI approval memorandum stated that the undercover operatives had scheduled meetings with Representatives [deleted] and Hughes for November 7. The document reported that Silvestri had represented that Hughes and [deleted] would promise to assist the sheik in immigrating in return for $50,000 each.[109] The memorandum states that Assistant United States Attorney Edward Plaza had recommended that the payoffs be made, if each Congressman agreed to perform an official act in return, was told that he would be asked to fulfill his promise, and acknowledged receipt of the money during the meeting. An attachment to the memorandum states that "these Congressmen will be the last to be contacted relative to the political asylum scenario." ([Deleted])

On the evening of November 6, Silvestri mentioned to a business contact of his, Marilyn S. Bell, that he knew some foreign nationals who were interested in contributing to political campaigns in the United States. (*See* David Dir interview of Joseph Silvestri, Nov. 5, 1981, at 17; FD 302 of Thomas S. Hoy and James F. Kaspar, Feb. 2, 1980.) Bell suggested that Silvestri's acquaintances consider contributing to the Presidential campaign of Senator Larry Pressler from South Dakota. (*See id.*) On the following morning Bell arranged for Silvestri to meet Senator Pressler. (*See* FD 302 of Michael D. Grogan and Fred P. Vichich, Mar. 31, 1980.) Silvestri obtained an appointment from Senator Pressler's office for that afternoon. (*See* Statement of Harriet Dent; FD 302 of Thomas S. Hoy and James F. Kaspar, Feb. 2, 1980.) Silvestri telephoned DeVito at the W Street townhouse at approximately 11:00 a.m. and said that [deleted] was temporarily unavailable and that, in addition, at 1:00 p.m., he was going to bring Senator Pressler instead of Hughes. (*See* Sel. Comm. Hrg., July 22, 1982, at 40–42 (testimony of John Good); Sel. Comm. interview of Anthony Amoroso, Sept. 22, 1982.) Amoroso has stated that he did not record the conversation because the telephone on which he received the call was not connected to recording equipment. (*Id.*) Supervisor Good telephoned HQ Supervisor Michael Wilson from the townhouse to inform FBI HQ of Silvestri's call. Strike Force attorney Jacobs also called Strike Force Chief Puccio. Director Webster and Puccio approved the meeting. (*See* Sel. Comm. Hrg., July 22, 1982, at 43–44 (testimony of John Good); Sel. Comm. Hrg., July 27, 1982, at 54–55 (testimony of Thomas Puccio); Sel. Comm. Hrg., July 29, 1982, at 22–24 (testimony of John A. Jacobs).) An addendum to the

---

[109] This representation was inaccurate regarding Hughes. There is no taped conversation in which Silvestri represented that Hughes had agreed to accept a bribe. (See p. 75 *supra.*)

November 6 approval memorandum reflects the substitution of Senator Pressler for Hughes. The addendum states that "[i]nasmuch as authorization has been granted to expend $50,000 for the purpose of a bribe to Hughes, ITSP-Transportation Crimes Unit recommends that this authorization be extended to Pressler." The addendum does not state that Silvestri had represented that Senator Pressler knew the purpose of the meeting or had agreed to perform an official act in return for money. Director Webster wrote on the memorandum, "Try to be sure that this new Senator knows he's being paid (bribed)." ([Deleted])

Silvestri telephoned the townhouse twice more and spoke with Weinberg, who recorded both conversations. In the first of those calls, at 11:30 a.m., Silvestri told Weinberg that he would be unable to meet [deleted] for lunch as he had planned. He said that Senator Pressler had agreed to meet, but that the Senator had not yet spoken with him to arrange the meeting. ([Deleted]) One hour later Silvestri told Weinberg that he still had not heard from [deleted] and that he had arranged to meet Senator Pressler and expected to arrive at the townhouse with Pressler at 2:00 or 2:30 p.m. ([Deleted]) During the lunch hour Bell, at the request of Senator Pressler's office, telephoned Silvestri, who was meeting with [deleted], and told him that she had arranged for Senator Pressler and her to meet him outside a restaurant in Georgetown. *(See* FD 302 of Thomas S. Hoy and James F. Kasper, Feb. 2, 1980; David Dir interview of Joseph Silvestri, Nov. 5, 1981, at 19.) Shortly after 3:00 p.m. Bell, Senator Pressler, and Silvestri met as arranged and drove to the W Street townhouse. (*See* FD 302 of Michael D. Grogan and Fred P. Vichich, Mar. 31, 1980; FD 302 of Thomas S. Hoy and James F. Kasper, Feb. 2, 1980.)

Bell remained in the car while Silvestri led Pressler into the townhouse and introduced him to DeVito and Weinberg. *(See id.;* [Deleted], *reprinted in* 128 Cong. Rec. S 1903 (daily ed. Mar. 10, 1982).) DeVito described the sheiks' fears and interest in ensuring their ability to emigrate to the United States if necessary. He then asked if Senator Pressler would sponsor private legislation to assist the sheiks. ([Deleted], *reprinted in* 128 Cong. Rec. at S 1904 (daily ed. Mar. 10, 1982).) Silvestri interrupted and told DeVito that he had met Senator Pressler only a few blocks away and that "we didn't get a chance to talk about that aspect of it. * * * I talked to his campaign manager, his treasurer." *(Id.)* DeVito stated, "I'm sure Joe * * * has mentioned this. * * * We've got the money, okay, and we're willing to put out the money * * * $50,000 is * * * no problem, putting that kind of money out." ([Deleted], *reprinted in* 128 Cong. Rec. at S 1905 (daily ed. Mar. 10, 1982).) Silvestri interjected, "The Senator doesn't even know that. We haven't even worked out the details with his people." *(Id.)* Senator Pressler told DeVito, "[W]e do seek contributions, but we can't make any promises or any * * * other than to listen and to be educated, but then to make a judgment, you know. * * * I can't promise that I would introduce 'X' bill for 'X' person if something happens." *(Id.)* When it became clear to Supervisor Good and attorney Jacobs, who were monitoring the meeting from another room in the townhouse, that Senator Pressler had not been told about and did not understand the purpose of the meeting, Jacobs telephoned DeVito and told him to terminate the meeting as soon as possible. ([Deleted], *reprinted in* 128 Cong. Rec. at S 1906 (daily ed. Mar. 10, 1982); Sel. Comm. Hrg., July 29, 1982, at 33 (testimony of John A. Jacobs).) Senator Pressler told DeVito,

> [I]t would not be proper for me to promise to do anything in return for a campaign contribution, so I would not make any promises or any—I mean you can judge, you can hear my general philosophy and then you'll make a judgment, but I can't, you know, you can't make a commitment to do anything in these campaigns. Indeed, I would not feel intellectually honest doing that, you know, until I'm faced with the situation. ([Deleted], *reprinted in* 128 Cong. Rec. at S 1906 (daily ed. Mar. 10, 1982).)

As Senator Pressler and Silvestri prepared to leave, Silvestri told DeVito that he would bring [deleted] to the townhouse the following morning. ([Deleted], *reprinted in* 128 Cong. Rec. at S 1906 (daily ed. Mar. 10, 1982).)

Silvestri telephoned Weinberg later that afternoon. ([Deleted]) Weinberg criticized Silvestri for having brought Senator Pressler without having briefed him. ([Deleted]) Silvestri said that [deleted] would come the following morning and that [deleted] could still be arranged. ([Deleted]) Weinberg told him to make sure that [deleted] was "straightened out" on the purpose of the meeting. ([Deleted]) On the following morning, Silvestri told DeVito on the telephone that [deleted] had been detained and might not be available that day. ([Deleted]) DeVito rebuked Silvestri for the meeting with Senator Pressler. ([Deleted]) Silvestri maintained that he had cancelled [deleted] the previous afternoon because he had believed a Senator to be more valuable. ([Deleted]) DeVito said that he did not want to meet [deleted] unless [deleted] would make an explicit commitment. ([Deleted]) Silvestri insisted that [deleted] would offer adequate assurances. ([Deleted]) DeVito and Silvestri agreed that they would try to arrange a meeting with [deleted] later that day, if [deleted] schedule permitted. ([Deleted]) No such meeting occurred.

On the evening of November 8 Criden introduced DeVito and Weinberg to Larry Buser at the W Street townhouse.[110] *(See Thompson* Gov't Trial Ex. 18A.) Criden explained that Murphy had suggested that Buser, a former shipping executive, present shipping investment proposals to Abdul Enterprises. *(See id.* at 2.) Buser proposed that Abdul Enterprises purchase two shipping companies, which he would manage and which Murphy would use his congressional position to assist. *(See id.* at 4-7, 10-13, 15-16.) Buser stated that Murphy would have a concealed interest in the companies. *(See id.* at 4, 15-16, 19-20.) DeVito and Weinberg expressed interest in the proposals, and Buser promised to provide them with more details in a few weeks. *(See id.* at 12, 19-20.) After Buser had left, Criden told Weinberg and DeVito that he could produce John Murtha of Pennsylvania the following week. *(See id.* at 23.) DeVito asked Criden not to schedule Murtha until DeVito had determined how many additional politicians he wanted to meet. *(See id.* at 24-25.) DeVito said that Abdul Enterprises was "reaching a saturation point" with the political payoffs. *(Id.* at 25.)

On November 10 Weinberg and DeVito asked Silvestri about [deleted]. ([Deleted]) Silvestri said that he would contact [deleted] to arrange a meeting. ([Deleted]) On November 12 Silvestri and Weinberg discussed plans for [deleted]. ([Deleted]) Silvestri told Weinberg that he had arranged meetings with Mayors [deleted] and [deleted] and was contacting Mayor [deleted], as he had agreed to do. ([Deleted]) DeVito, Weinberg, Silvestri, and [deleted] met in Atlantic City on November 15. ([Deleted]) Weinberg asked Silvestri for guidance on how to bribe the New Jersey mayors. ([Deleted]) Although Weinberg and DeVito were introduced to several mayors over the following several days, no bribes were discussed. ([Deleted])[111] On November 15 Silvestri told DeVito and Weinberg that [deleted] had sent him a letter, a few days after the [deleted] payoff, acknowledging receipt of an advance payment for expenses. ([Deleted]) Silvestri said that [deleted] had not wanted to accept the cash, but that they had agreed that [deleted] would deposit the money in his bank account as if it were a retainer for legal work [deleted] would do for Silvestri. ([Deleted]) Silvestri repeated that [deleted] was interested in a partial interest in a casino. ([Deleted])

On the morning of November 15 Good told Amoroso to instruct Weinberg to reestablish contact with John Stowe to ascertain if Representative Jenrette would participate in the asylum scenario. (*See Jenrette* Trial Tr. 284, 434-35.) Weinberg presented the asylum scenario to Stowe in an unrecorded telephone conversation. (*See id.* at 283-85.) Stowe agreed to ask Jenrette if he would promise to assist in return for $50,000. (*See id.* at 285-86.) Stowe reported in another unrecorded conversation that evening that Jenrette had agreed to assist. (*See id.* at 286.) Weinberg arranged a meeting for December 3 with DeVito and Stowe and a meeting for December 4 with Jenrette, Stowe, and DeVito. (*See id.*)

Department of Justice and FBI HQ officials met with Abscam Strike Force attorneys and field agents in Washington, D.C., on November 14. ([Deleted]) The group agreed to attempt to perfect the cases against Senator Williams and Representatives Myers, Lederer, Thompson, and Murphy by contacting each official to induce him to commit an overt act to further the sheiks' immigration. ([Deleted]) The participants established two additional priorities: to perfect cases against New Jersey state and local officials through the casino license scenario and to determine the degree of influence that organized crime individuals held over public officials. ([Deleted]) A memorandum memorializing this meeting noted that a reporter with *The Wall Street Journal* had inquired about a major investigatin but had agreed not to pursue the story. ([Deleted]) This appears to have been the first report of awareness by a member of the news media of the Abscam investigation.

On November 19 attorneys and agents from New York, New Jersey, and Washington, D.C., met in Brooklyn to discuss investigative actions necessary to prosecute the pending bribery cases. ([Deleted]) *reprinted in* 128 Cong. Rec. S 1511 (daily ed. Mar. 3, 1982).) Contrary to the decision that had been made in Washington five days earlier, the prosecutors present recommended that no further actions be taken with Errichetti, MacDonald, Myers, Lederer, or Thompson. (*See id.*) They decided, howevever, that it would "be necessary to recontact U.S. Senator Williams "in [an] attempt to obtain an overt action on his part regarding his sponsoring of some type of legislation * * * [to assist the] titanium mine." (*Id.*) The attorneys and agents suggested further "that attempts should be made to elicit from U.S. Senator Williams whether or not he wanted his shares hidden * * *" (*Id.*) The participants also determined that Murphy should be recontacted in an attempt to elicit from him a guarantee that he would use his office to obtain asylum for the sheik. (*See id.*) They decided not to make further contact with [deleted], because of his impending indictment for income tax violations. ([Deleted]) Finally, the participants agreed to hold the [deleted] case "in abeyance" pending a review of the case. ([Deleted])

---

[110] This meeting is discussed at p. 280 *supra.*

[111] Contrary to Silvestri's prior assurances, [deleted] did not appear at a meeting.

On November 19 Criden again offered to produce Representative Murtha if DeVito and Weinberg wanted him. (*See Thompson* Gov't Trial Ex. 19A, at 2–3.)

On November 20 Stanley Weisz met Gino Ciuzio on business in Florida. (*See Ciuzio* Trial Tr. 1115–16.) In the course of their conversation, Weisz mentioned that a client of his, William Rosenberg, had asked him if he knew any Congressmen to introduce to Abdul Enterprises' representatives. (*See id.* at 1127, 1129.) Ciuzio responded that he knew a Congressman who might be willing to meet the sheik's representatives. (*See id.* at 1128–29.) On November 23 in Tampa, Florida, Ciuzio outlined the asylum scenario to Representative Richard Kelly of Florida, and Kelly agreed to participate. (*See Kelly* Trial Tr. 2657–59.) Ciuzio informed Weisz of Kelly's agreement to assist Abdul Enterprises. (*See id.* at 4113–15; *Ciuzio* Trial Tr. 1129.)

Also on November 23 Weinberg told Criden that Abdul Enterprises was definitely interested in financing Murphy and Buser's acquisitions of shipping companies. (*See Thompson* Gov't Trial Ex. 20A, at 1–2.) Weinberg told Criden that he still did not know whether DeVito would want to meet Murtha. (*See id.* at 2.) On November 28 the New York Field Office informed FBI HQ that it anticipated a meeting with Representative Murphy. ([Deleted]) The Field Office proposed that DeVito and Weinberg ask Murphy to request immigration assistance from the American Embassy in London, in order to fulfill the requirement established by the prosecutors at the November 19 meeting. ([Deleted]) On November 30 Weinberg and Criden tentatively arranged a meeting with Murphy and Buser for mid-December. (*See Thompson* Gov't Trial Ex. 21A.) Criden again requested guidance on Murtha, who he said wanted to know whether there would be a meeting. (*See id.* at 2.)

On November 27 Weinberg and Stowe confirmed arrangements for meetings with DeVito on December 3 and with DeVito and Jenrette on December 4. (*See Jenrette* Gov't Trial Ex. 7C.) On the following day the New York Field Office notified FBI HQ of the anticipated meetings and recommended that Jenrette be offered $50,000 in return for his promise to use his influence to help the sheik immigrate. ([Deleted]) Concurrently, the Columbia, South Carolina, Field Office provided FBI HQ with information about the prior federal law enforcement investigations of, and allegations against, Jenrette and Stowe. ([Deleted]) On November 30, FBI HQ approved the offer of a $50,000 bribe to Jenrette. ([Deleted])

On November 30, Silvestri asked Weinberg whether he still wanted to meet Congressmen. ([Deleted]) Silvestri mentioned [deleted], Hughes, and Senator Pressler and stated that he wanted to introduce Representative [deleted] from New Jersey. ([Deleted]) Weinberg and Silvestri agreed to try to schedule a meeting with [deleted] on December 5. ([Deleted])

Sometime in November Peter Vaira, United States Attorney for the Eastern District of Pennsylvania, received, from an NBC reporter with whom he was acquainted, an inquiry regarding a rumored investigation of Senator Williams. (*See Jannotti* Pre-trial D.P. Tr. 2.183–.184.) Vaira told the reporter that, although he had heard the same rumor, it was baseless. (*See id.*) Vaira reported the inquiry, which he described as his first awareness of press knowledge of Abscam, to David Margolis of the Department of Justice in Washington, D.C. (*See id.*)

DECEMBER 1979

On December 4 Vaira and Edgar Best, Special Agent in Charge of the FBI Field Office in Philadelphia, received permission from FBI HQ and the Department of Justice to conduct an offshoot investigation of Abscam in Philadelphia. FBI HQ told Best to develop a plan for such an investigation. ([Deleted]; *Jannotti* Pre-trial D.P. Tr. 2.179–.181.)

On the evening of December 3 Weinberg, Stowe, and DeVito met in the cocktail lounge of the Georgetown Inn in Washington, D.C. (*See Jenrette* Trial Tr. 287.) Stowe said that Jenrette had agreed to participate. (*See id.* at 288.) DeVito explained the asylum scenario in detail and asked Stowe to discuss the problem with Jenrette and to determine if Jenrette would meet and would agree to assist in return for money. (*See id.* at 288–89.) Although the meeting was recorded, the audio tape was largely unintelligible because of background noise. (*See id.* at 290; *see also Jenrette* Def. Trial Ex. 81.)

On the afternoon of December 4 Jenrette and Stowe met at a restaurant near the Capitol. (*See Jenrette* Trial Tr. 3390–91.) Jenrette agreed to accompany Stowe to meet Weinberg and DeVito that evening. (*See id.* at 3391–93.) Stowe telephoned Weinberg to confirm the appointment. (*See Jenrette* Gov't Trial Ex. 8C.) Weinberg told Stowe that DeVito would require Jenrette to make explicit assurances in return for the money. (*See id.* at 3.) That evening Stowe and Jenrette met Weinberg and DeVito at the W Street townhouse. (*See Jenrette* Def. Trial Ex. 25.) DeVito presented the asylum scenario. (*See id.* at 3–10.) Jenrette stated that he would ensure that a private bill was introduced to assist the sheiks. (*See id.* at 11.) DeVito said that he was offering $50,000 for Jenrette's agreement and $50,000 whenever Jenrette had to introduce legislation. (*See id.* at 14.) They discussed the possibility of Abdul Enterprises' making Jenrette a personal loan and financing Stowe's acquisition of the assets of American Gear and Pinion, a South Carolina corporation. (*See id.* at 17–21.) Jenrette suggested that Abdul Enterprises locate a Senator to introduce a companion private immigration bill simultaneously with the bill in the House of Representatives. (*See id.* at 22, 25–26.)

After Weinberg and Stowe left Jenrette and DeVito to talk privately, Jenrette told DeVito that, if he took the money, he would want to have his law partner accept it as if it were a legal fee. (*See id.* at 27–28.) DeVito suggested that he give the money directly to Jenrette in private and that Jenrette make his arrangements with Stowe privately. (*See id.* at 28–29.) Jenrette stated that he wanted to wait a day to think about the transaction. (*See id.* at 29–32.) Jenrette told DeVito that he was under federal investigation and that he would know within a day whether the investigation was likely to be pursued. (*See id.* at 32–33.) He said that he would prefer not to accept the money until he knew what his prospects were, because a serious investigation would inhibit his ability to assist Abdul Enterprises. (*See id.* at 33–35.) Jenrette agreed to telephone DeVito the following day and to arrange to meet again to accept the money, if his prospects seemed good. (*See id.* at 36–43.) Jenrette told DeVito, "[T]here's nothing I'd rather do than walk out with it [the money] okay? * * * I got larceny in my blood. I'd take it in a goddamn minute." (*Id.* at 37, 39.)

On the following afternoon Stowe telephoned DeVito and said that Jenrette wanted Stowe to accept the money and to deliver it to him. (*See Jenrette* Gov't Trial Ex. 9C, at 1.) DeVito objected that Jenrette had promised to accept the money personally. (*See id.* at 1–2.) Later in the afternoon Stowe proposed that Jenrette telephone DeVito, while DeVito gave Stowe the money. (*See Jenrette* Gov't Trial Ex. 10C, at 1–2.) Jenrette telephoned DeVito early that evening and agreed to arrange to take the money himself. (*See Jenrette* Gov't Trial Ex. 11C.) Jenrette and Stowe arranged to go to the townhouse together on the afternoon of December 6. (*See Jenrette* Def. Trial Ex. 40; *Jenrette* Gov't Trial Ex. 12C.) Jenrette telephoned that afternoon and said that Stowe was with him, but that he did not have time to go to the townhouse with Stowe. (*See Jenrette* Gov't Trial Ex. 13C, at 1–2.) DeVito agreed to give the money to Stowe that afternoon. (*See id.* at 4–7.) DeVito, Weinberg, and Stowe met at the townhouse. (*See Jenrette* Def. Ex. 26.) DeVito gave Stowe $50,000. (*See id.* at 4.) Stowe returned to Jenrette, who telephoned DeVito to confirm that Stowe had arrived with the money. (*See Jenrette* Gov't Trial Ex. 14C.)

On December 4 Weinberg again encouraged Criden to obtain the shipping investment proposals from Murphy and Buser. (*See Thompson* Gov't Trial Ex. 22A, at 1–2.) Criden again inquired if Abdul Enterprises was interested in Murtha. (*See id.* at 2.) On December 7 Weinberg told Criden that Murtha had been approved and that Criden should schedule a meeting at the townhouse. ([Deleted]) Three days later Criden proposed that the meeting be arranged for later that week. (*See Thompson* Gov't Trial Ex. 23A, at 1–2.) Weinberg told Criden to schedule the Murtha payoff and the meeting with Murphy and Buser for early January. (*See id.* at 2, 4.)

Weinberg and Silvestri spoke about [deleted] on December 4. ([Deleted]) When Weinberg asked Silvestri to arrange a meeting, Silvestri said that he would try, but that he had not yet discussed the bribe offer with [deleted]. ([Deleted]) They also discussed [deleted] and Lieutenant Governor [deleted] as prospects. ([Deleted]) On the next day Silvestri stated that [deleted] would participate. ([Deleted]) When Weinberg said that explicit assurances would be required, Silvestri stated that [deleted] would provide them, but that the other officials did not want to accept money in return for their offers to help. ([Deleted])[112]

---

[112] This statement by Silvestri may explain Silvestri's failure ever to schedule a meeting for DeVito and Weinberg with [deleted] Lieutenant Governor [deleted].

On December 7 Weinberg and DeVito met [deleted] Mayor [deleted] and [deleted] whom [deleted] had invited to discuss political support for casino licensing. ([Deleted]) On the next day DeVito and Weinberg met with [deleted] and [deleted]. ([Deleted]) [deleted] stated that he and [deleted] controlled confirmation of Governor Brendan Byrne's appointments of casino control commissioners. ([Deleted]) In answer to a question from Weinberg, [deleted] stated that [deleted] could not be bribed. ([Deleted]) When Weinberg asked whether Casino Commissioner [deleted] could be bribed, [deleted] replied that he already controlled [deleted]. ([Deleted]) [deleted] and [deleted] said that Weinberg's proposal to offer commissioners jobs was inappropriate and unwise. ([Deleted]) They said that they had sufficient influence and that it was unnecessary to offer bribes. ([Deleted]) DeVito and Weinberg responded that they preferred paying money. ([Deleted]) After [deleted] and [deleted] left, Weinberg and DeVito met with Silvestri. ([Deleted]) Silvestri stated that [deleted] was controlled by the Mafia and that a mobster associate of [deleted] named Anthony DeLuca had told him that [deleted] would accept a bribe in return for promising to help the sheik immigrate. ([Deleted]) DeVito told Silvestri that he wanted to meet DeLuca before meeting [deleted]. ([Deleted]) Silvestri agreed to arrange a meeting between DeVito and DeLuca. ([Deleted])

DeVito and Weinberg met with DeLuca and Silvestri on December 11. ([Deleted]) Weinberg and DeVito outlined the asylum scenario. ([Deleted]) DeLuca said that [deleted] had agreed to participate. ([Deleted]) DeVito and DeLuca agreed on ground rules for a payoff meeting with [deleted]. ([Deleted]) On the following day DeLuca told Weinberg and DeVito that they could meet [deleted] later that month, but that they would first have to meet [deleted] "right hand man," Frank Boscia. ([Deleted]) DeLuca introduced DeVito and Weinberg to Boscia on the next day. ([Deleted]) Weinberg and DeVito explained the asylum scenario and stated that DeLuca had said that Boscia could arrange [deleted] participation. ([Deleted]) Boscia agreed to raise the subject with [deleted]. ([Deleted]) Boscia said that he would have an answer by early January but that he would have to control the logistics of a meeting. ([Deleted])[113]

On December 8 John Stowe told Weinberg by telephone that Jenrette needed to borrow $150,000 from Abdul Enterprises. (*See Jenrette* Gov't Trial Ex. 15C.) Two days later Jenrette presented the loan request to Weinberg, who had telephoned Jenrette at Stowe's request. (*See Jenrette* Gov't Trial Ex. 16C; *Jenrette* Def. Trial Exs. 42, 43; *Jenrette* Trial Tr. 1374-75.) Weinberg continued to stall Stowe on the loan for Jenrette and on the financing for American Gear and Pinion Company for the remainder of December. (*See, e.g., Jenrette* Gov't Trial Ex. 17C; *Jenrette* Def. Trial Exs. 44, 45, 46.) Weinberg and Stowe arranged to meet Jenrette on January 7. (*See Jenrette* Def. Trial Exs. 45, 46, 47; [Deleted].)

In mid-December Stanley Weisz told Rosenberg that he might know of a Florida Congressman, if Rosenberg still wished to meet one. (*See Ciuzio* Trial Tr. 1131-32.) Rosenberg telephoned Weinberg on December 16 and said that he had a Congressman who would participate. (*See Kelly* Gov't Trial Ex. 11C, at 5-10.) Rosenberg said that he would provide the Congressman's name within a week, and Weinberg suggested that Rosenberg arrange a meeting in Washington in early January. (*See id.* at 12-15.) Rosenberg asked Weisz for the Congressman's name, and Weisz telephoned Ciuzio to explain the developments and to ask Ciuzio to telephone Weinberg. (*See Ciuzio* Trial Tr. 1133-37.) On December 17 Rosenberg telephoned Weinberg and told him to meet Ciuzio to discuss the participation of the Congressman, whom he identified as Sullivan. (*See Kelly* Gov't Trial Ex. 12C, at 1-11.) Ciuzio, DeVito, and Weinberg met in Florida on December 19. (*See Kelly* Gov't Trial Ex. 1C.) DeVito briefed Ciuzio on the asylum scenario. (*See id.* at 14-15.) Ciuzio identified the Congressman as Representative Kelly and said that Kelly was already accepting bribes and that he had agreed to participate. (*See id.* at 16-17, 31-34, 38-39.) On the next day Ciuzio told Weinberg that he would try to arrange a meeting with Kelly in early January. (*See Kelly* Gov't Trial Ex. 14C, at 10.) On December 21 Ciuzio told Weinberg that Weisz had objected to Kelly's accepting the money directly. (*See Kelly* Gov't Trial Ex. 15C, at 1-10.) Weinberg agreed to call Weisz to discuss the payoff. (*See id.* at 17-18.) Through conversations with Weisz, Ciuzio, and Rosenberg, Weinberg arranged the payoff meeting with Kelly in January. (*See Ciuzio* Trial Tr. 1139-40, 1155-61; [Deleted]; *Kelly* Gov't Trial Exs. 16C, 17C; [Deleted].)

---

[113] The FBI conducted indices searches on DeLuca and Boscia. Little was learned about either, although a source told the FBI that DeLuca had organized crime connections. ([Deleted]) The United States Attorney's Office in Newark reported that DeLuca had pleaded guilty to income tax evasion. ([Deleted])

In late December and early January, Weinberg, DeVito, and Criden arranged meetings with Murphy and Representative Murtha for January. ([Deleted]; *Thompson* Gov't Trial Exs. 24A, 25A, 26A, 27A, 28A.) Criden stated that Murphy would have a hidden interest in the shipping company that Abdul Enterprises financed. (*See Thompson* Gov't Trial Ex. 24A, at 8.) Criden asked if Abdul Enterprises could handle more political payoffs and stated that he could "deliver pretty much almost anybody we want within reason." (*Id.* at 13.)

On December 21 a conference was held at FBI HQ attended by Edgar Best, Special Agent in Charge of the Philadelphia FBI Field Office, HQ personnel Gow and Wilson, Supervisor Good, Amoroso, and Michael Wald, a Special Agent in Philadelphia. ([Deleted]; *Jannotti* Pre-trial D.P. Tr. 5.34-.37.) The FBI and the Department of Justice authorized Best to conduct a Philadelphia-based offshoot of the Abscam operation, for a period of only ten days, beginning on January 2, 1980. (*See id.* at 3.235, 5.36-.37.)

JANUARY 1980

On the morning of January 7 Criden took Representative Murtha to meet DeVito and Weinberg at the W Street townhouse in Washington. (*See Thompson* Gov't Trial Ex. 29A-1.) DeVito explained the asylum scenario and Weinberg stated that they were "buying insurance." (*See id.* at 9-12.) Murtha responded that the sheik would have no problem immigrating and that introducing private legislation "would be the last thing you'd want done." (*Id.* at 12.) He said, "[T]o me insurance is investing in my Goddamn district. * * * I'm delighted to do business with the guy [the sheik] and do any Goddamn thing I can within, ahh, bounds, ya know, so I don't get myself in jail in order to get him into the country or whatever needs to be done." (*Id.* at 12-13.) Murtha refused an explicit offer of money and stated that Thompson's and Murphy's assurances were sufficient and that he wanted only investments in his congressional district. (*See id.* at 13-14, 29-30.) Murtha continued, "Now as I told Howard, I wanted to deal with you guys a while before I made any transactions at all. * * * After we've done some business, ya know, then, ahh, I might change my mind, but right now, that's all I'm interested in—." (*Id.* at 14; *see id.* at 26-35.) During this conversation, Criden left Murtha and spoke privately first with Weinberg and then with DeVito. (*See Thompson* Gov't Trial Ex. 29A-2.) Outside of Murtha's presence, Criden told both Weinberg and DeVito that Murtha wanted the money and had gone to the townhouse to accept the money. (*See id.* at 1-4, 8.) Criden told DeVito further that he wanted money for having introduced Murtha and that Thompson and Murphy also expected a share. (*See id.* at 3-10.) DeVito told Criden that he would not pay Murtha unless Murtha asked for the money. (*See id.* at 8-9, 12, 14.) He said that he would give Criden and Murphy money when Criden brought Murphy to meet later that week but suggested that Criden let Murtha decide whether he wanted to return to accept money. (*See id.* at 6, 9-12; *see Thompson* Gov't Trial Ex. 29A-1, at 42-44.) In a telephone conversation later that day, Criden repeated to Weinberg that Murtha had wanted the money but had been scared to take it. (*See Thompson* Gov't Trial Ex. 30A.)

Also on January 7 Jenrette and Stowe met DeVito and Weinberg at the Washington townhouse. (*See Jenrette* Def. Trial Ex. 27.) Jenrette outlined his financial difficulties, and DeVito and Weinberg promised to finance Jenrette's debts. (*See id.* at 6-26.) Jenrette raised the subject of the asylum scenario and stated that he thought that Senator Strom Thurmond of South Carolina would assist with private legislation in the Senate but that Senator Thurmond would probably want to use Stowe as an intermediary to accept the money. (*See id.* at 28-35.) Jenrette said that the Senator probably would be unwilling to meet them at the townhouse. (*See id.* at 32-33.) Jenrette acknowledged receipt of the money that had been given to Stowe in December. (*See id.* at 49-51.) Jenrette said that he would speak with Senator Thurmond the next day. (*See id.* at 52.)

Weinberg spoke to Tony DeLuca on the evening of January 7. ([Deleted]) DeLuca said that he had talked to [deleted] and that they had arranged for DeLuca to introduce [deleted] son-in-law to DeVito initially. ([Deleted]) The same day Silvestri told Weinberg that he had met with [deleted]. ([Deleted])

On the evening of January 8 Representative Kelly, Weisz, Ciuzio, and Rosenberg met DeVito and Weinberg at the W Street townhouse. (*See Kelly* Gov't Trial 2C.) While Rosenberg, Kelly, and DeVito met, Ciuzio told Weinberg privately that Kelly would not take money personally and that Weinberg should tell DeVito not to offer Kelly money. (*See id.* at 1-3.) Weinberg proposed that DeVito hand Ciuzio the money in Kelly's presence. (*See id.* at 3.) Ciuzio responded, "That's okay. But don't say, 'Hey, Congressman.' You know what I mean? You can't make him a fucking hood, you know." (*Id.*) Weinberg repeated that DeVito would insist on knowing that Kelly was receiving money. (*See id.* at 4-10.)

Then, meeting alone with Kelly, DeVito outlined the asylum scenario and the money he was offering. (*See id.* at 11-15.) Kelly responded,

> [T]his thing * * * will be helpful to me and * * * maybe * * * down the road sometime, you can do me a favor. But in the meantime, whatever those guys [Ciuzio, Weisz, and Rosenberg] are doing is is all right, but I got no part in that * * * [Y]our arrangement with these people is is all fine * * * [Y]ou have my assurance that * * * I'll stick by these people. (*Id.* at 16.)

Shortly thereafter, Kelly asked to speak privately with Ciuzio. (*See id.* at 21.) When Kelly returned, he told DeVito to give Ciuzio the money in his presence. (*See id.* at 22-23.) Kelly stated, "It's a very complicated thing * * * for me to start dealing in money."(*Id.* at 26.) DeVito responded that he thought that Kelly would be the most protected if he took the money directly from Devito in private. (*See id.* at 26-27.) Kelly agreed and accepted $25,000. (*See id.* at 27-28.) Kelly said that he would do whatever it took to assist the sheik. (*See id.* at 35.)

On January 10 Criden, Murphy, and Buser met DeVito and Weinberg at the W Street townhouse. (*See Thompson* Gov't Trial Ex. 33A-1.) [114] In the course of a discussion of the proposed shipping investment, Murphy and Buser said that Murphy was "[n]ot in" the deal. (*See id.* at 30.) DeVito objected that he had agreed to finance the acquisition with the understanding that Murphy would help the venture. (*See id.* at 31.) Buser and Criden stated that he would. (*See id.*) Murphy agreed that the shipping investment would provide the necessary justification for his efforts on behalf of the sheik's relocation. (*See Thompson* Gov't Trial Ex. 33A-2, at 2.)

Then, while Buser, Weinberg, and Murphy ate lunch, DeVito told Criden privately that he wanted to speak to Murphy alone. (*See Thompson* Gov't Trial Ex. 33A-3, at 1.) Criden said that Murphy would have an interest in the venture but that he wanted no one to know and had agreed for Criden to hold his shares. (*See id.* at 1-4.) DeVito gave Criden the $5,000 he had promised for the Murtha meeting. (*See id.* at 5.) Criden asked to be paid in the future directly by DeVito, rather than depending on receiving a share of the officials' bribes. (*See id.* at 6-8.) Criden returned to Buser and Weinberg, while Murphy and DeVito met privately and discussed the sheik's immigration prospects. (*See id.* at 9-11.) They discussed the Murtha meeting, and DeVito suggested that Murphy was being "coy." (*See id.* at 12-14.) Murphy responded, "Sure," but then stated, "[Y]ou didn't give me any money. * * * I never received any money from anyone * * * and would not accept anything * * * [f]rom you or from Howard." (*Id.* at 14, 15.) The next day Criden reaffirmed by telephone that Murphy was participating in the shipping venture. (*See Thompson* Gov't Trial Ex. 34A, at 2.) [115]

On January 11 Weinberg initiated the Philadelphia phase of Abscam with a telephone call to Criden. (*See Jannotti* Gov't Trial Ex. 2A.) Acting under the instructions of Supervisor Good and Philadelphia Field Office Special Agent in Charge Edgar Best, Weinberg told Criden to expect a visit from Ernie Poulos (Special Agent Ernest Haridopolos) and another employee of the sheik (Special Agent Michael Wald, who used the name Michael Cohen). (*See id.* at 2.) Weinberg explained that the sheik wanted to build a hotel in Philadelphia and asked Criden to contact Representative Myers or Lederer to help. (*See id.* at 2-3.) Criden responded that he knew other people in Philadelphia who would be more helpful and mentioned his law partner, Philadelphia City Councilman Louis Johanson. (*See id.* at 3-4.)

On January 13 Tony DeLuca met Weinberg and told him that he had arranged for Weinberg to meet [deleted] son-in-law, [deleted], the next day. ([Deleted]) DeLuca introduced [deleted] to Weinberg and DeVito on January 14. ([Deleted]) After DeVito outlined the asylum scenario, [deleted] said that the problem could best be addressed by retaining a law firm, rather than through private legislation. ([Deleted]) [deleted] said that, unless [deleted] and Abdul Enterprises had established a long-term working relationship, [deleted] would not accept money to make commitments. ([Deleted]) The Newark FBI Field Office notified FBI HQ of this meeting and recommended that a meeting between [deleted] and the undercover operatives be scheduled to resolve what it characterized as serious outstanding allegations against [deleted]. ([Deleted])

---

[114] This meeting is discussed in detail at pp. 280-82 *supra*.

[115] On January 14 Murphy asked a private investigator to determine whether the Abdul Enterprises representatives were confidence men or government agents. (*See Thompson* Trial Tr. 1574-85.) After examining telephone and street directories and interrogating neighbors of Abdul Enterprises' Washington townhouse and Long Island office, the investigator reported to Murphy on January 18 his conclusion that the enterprise was a government aency. (*See id.* at 1586-96.)

In a teletype dated January 14, the New York Field Office advised FBI HQ of its plan for closing the Abscam cases. The Field Office anticipated asking Criden to cooperate with the government and seeking indictments against Myers, Lederer, Murtha, Thompson, Murphy, and Errichetti.[116] ([Deleted])

In early January DeVito and Weinberg told Feinberg and Katz to arrange a meeting between Senator Williams and the sheik, because the sheik wanted to ask the Senator to do him a personal favor and to sponsor his immigration into the United States. ([Deleted]) On January 15 Katz, Feinberg, and Senator Williams met DeVito, Weinberg, and Sheik Yassir Habib (Special Agent Richard Farhart) at the Plaza Hotel in New York City. (*See Wms.* Gov't Trial Ex. 25A, Sen. Comm. Print, Pt. 6, at 348.) Sheik Habib and Senator Williams met privately. The sheik outlined his interest in immigrating and asked the Senator to help. (*See id.* at 3-5, Sen. Comm. Print, Pt. 6, at 350-52.) Senator Williams responded that private legislation was very difficult to enact but that he "welcome[d] the chance to know you better and to support this effort of yours." (*Id.* at 5, Sen. Comm. Print, Pt. 6, at 352.) Sheik Habib stated that he wished to pay Senator Williams to help. (*See id.* at 8, Sen. Comm. Print, Pt. 6, at 355.)[117] Senator Williams responded,

> No * * * No, no, no. This, this is when I work in that area, that kind of activity, it is purely a public not er, no. * * * You are most gracious. Within our, my position when I deal with law and legislation it is, it is, it is not on, it's, it's, er, not with, within—(*Id.* at 9, Sen. Comm. Print, Pt. 6, at 356.)

At this point, the conversation was interrupted by a telephone call for Sheik Habib. (*Id.*) Puccio and Good, who were monitoring the meeting, had decided that Good should tell Farhart to elicit more specific commitments from Senator Williams.[118] (*Wms.* D.P. Tr. 473-75.) After the interruption Senator Williams stated,

> No, the, er, my interest is with my associates. * * * So my only interest is to see this come together. And the, and the, the elements that I can help with, your, your personal situation. Er, I am very, I find it, er, a desirable thing to do for you, personally. And it's part of creating something of value, bringing in that ore. (*Wms.* Gov't Trial Ex. 25A, at 9, Sen. Comm. Print, Pt. 6, at 356.)

After additional conversation about the titanium venture and the sheik's immigration needs, Good interrupted again with a telephone call to tell Farhart to try to get Senator Williams to link his assistance on the immigration matter more explicitly to the titanium investment. (*See id.* at 12, Sen. Comm. Print, Pt. 6, at 359; *Wms.* D.P. Tr. 177.) Before the meeting ended, Williams "pledge[d to] do everything in my power to advance your residency." (*Wms.* Gov't Trial Ex. 25A, at 14, Sen. Comm. Print, Pt. 6, at 361.)

On January 18 Weinberg telephoned Criden to tell him to expect to meet Michael Cohen (Special Agent Wald) and Ernie Poulos (Special Agent Haridopolos). (*See Jannotti* Gov't Trial Exs. 2B, 2C.) Criden met Cohen and Poulos at the Barclay Hotel in Philadelphia that afternoon. (*See Jannotti* Gov't Trial Ex. 2D.) Cohen explained that the sheik had decided to build a hotel in Philadelphia, was concerned about possible zoning and labor problems, and hoped to ensure cooperation from the Philadelphia government. (*See id.* at 2-4, 7-16.) Criden stated that his law partner, who was a city councilman, and George Schwartz, the President of the City Council, were powerful. (*See id.* at 4, 17-18.) Criden told Cohen that Cohen could "deal with" both officials. (*See id.* at 19.) Criden identified his partner as Louis Johanson and said, "He, ah, anything,—anything you wanna—my partner owes his allegiance to me." (*Id.* at 19-20.) Criden stated that the "tariff" for Johanson would be $25,000 and that Schwartz would cost at least $30,000. (*See id.* at 21, 28, 35-37.) Criden promised to try to arrange meetings with both councilmen and assured Cohen that he could "talk as candidly as you want" with Johanson. (*Id.* at 28; *see id.* at 22-23, 26-27, 30-31, 35-36.) Criden said that he would "have to clear it first with" Schwartz (*id.* at 28), but that "we can deliver everything that you want for you" (*id.* at 22). Criden warned Cohen and Poulos not to try to bribe [deleted]. (*See id.* at 33.) Finally, Cohen and Criden agreed that Criden would receive $10,000 for producing the two councilmen for bribes. (*See id.* at 37-39.)

---

[116] The teletype makes no reference to the other public officials involved in the Abscam undercover operation.

[117] Payment of a $40,000 bribe to Senator Williams had been approved. ([Deleted])

[118] The controversies surrounding the timing of this telephone call specifically and the meeting generally are extensively discussed at pp. 237-40 *supra.*

That evening Criden introduced Johanson to Cohen and Poulos. (*See Jannotti* Gov't Trial Ex. 2E.) Cohen outlined the sheik's interest in building a hotel in Philadelphia and in ensuring the cooperation of the local government. (*See id.* at 7-8, 17-30.) Johanson guaranteed that he would "[d]eliver you the majority of the votes that you need to straighten out any problems you have with the City Council." (*Id.* at 49; *see id.* at 73-74.) Cohen gave Johanson $25,000. (*See id.* at 72, 80.) Johanson and Criden volunteered to approach City Council President Schwartz and Councilman Harry Jannotti to discuss their interest in accepting bribes. (*See id.* at 55-56, 81-83, 87.) Johanson left, and Criden remained to receive his $5,000 for having produced Johanson. (*See id.* at 96.) Criden repeated his assurances the he would determine whether Jannotti and Schwartz would participate. (*See id.* at 93-96.)

On January 22 Criden told Cohen that he had discussed the scenario with Jannotti and Schwartz, but that he had not yet received an answer from them regarding their wish to participate. (*See Jannotti* Gov't Trial Ex. 2F.) On the next day Criden told Cohen that Schwartz had agreed to participate in return for $30,000. (*See Jannotti* Gov't Trial Ex. 2G, at 2-4.) Criden agreed to try to schedule a meeting. (*See id.* at 6-7.) Criden introduced Schwartz to Cohen and Poulos that evening. (*See Jannotti* Gov't Trial Ex. 2H.) Cohen, Criden, and Schwartz discussed the hotel project and the sheik's interest in avoiding problems with the municipal government. (*See id.* at 5-9.) Schwartz and Criden described Schwartz' influence in the City Council and Philadelphia government, and Schwartz assured Cohen that he would have no problems. (*See id.* at 10-15, 20, 27-34, 69, 77-79.) Cohen gave Schwartz $30,000, and Schwartz left. (*See id.* at 79-82.) Cohen gave Criden $5,000. (*See id.* at 83.)

Cohen then asked whether he should meet Representatives Myers and Lederer to obtain their assistance with the hotel project. (*See id.* at 86-88, 91-92.) Criden promised to try to arrange meetings with Myers, Lederer, and Councilman Jannotti. (*See id.* at 95-96, 99-100, 116.) Cohen told Criden that he wanted to inform Myers and Lederer that they could be required to begin providing immigration assistance soon. (*See id.* at 101-02, 107-08.) Criden told Cohen again not to try to bribe [deleted]. (*See id.* at 109-12.)

On the afternoon of January 24 Criden told Cohen by telephone that Lederer was out-of-town but that he could arrange meetings with Jannotti and Myers. (*See Jannotti* Gov't Trial Ex. 2I.) That evening Criden introduced Jannotti to Cohen and Poulos, and Cohen explained the hotel scenario. (*See Jannotti* Gov't Trial Ex. 2J, at 1, 8-15.) Jannotti stated that, if the project was legitimate, he envisioned no problems and would assist regardless of "what else they [Abdul Enterprises] want to come up with." (*Id.* at 19; *see id.* at 9-22, 33-34.) Cohen elicited explicit assurances from Jannotti and gave him $10,000. (*See id.* at 33-35, 39-42.) After Jannotti left, Criden confirmed arrangements with Myers. (*See Jannotti* Gov't Trial Ex. 2K, at 15.) Cohen agreed to pay Criden $8,000 for Jannotti and Myers. (*See id.* at 15-17.)

Shortly thereafter Criden introduced Myers to Cohen and Poulos. (*See Myers* Gov't Trial Ex. 7A, at 31.) Cohen told Myers that the sheik's situation was deteriorating and asked what steps Myers would take if he were told soon that the sheik wanted to emigrate immediately. (*See id.* at 40.) Myers stated that it was difficult to predict his course of action before the problem arose, but that he could introduce private legislation if he had a justification to explain his actions. (*See id.* at 41-46.) Cohen then explained the hotel project and asked if Myers could assist those plans. (*See id.* at 47-49.) Myers responded that, although [deleted] could not be approached, Myers would use his influence with the City Council and other local officials. (*See id.* at 49-52, 66-70.) Myers also said that Pennsylvania state legislator [deleted] would be interested in assisting in his region. (*See id.* at 90-93.) After a discussion of prospective investments in the Port of Philadelphia, Atlantic City, and other locales in Pennsylvania, Myers complained that he had been short-changed in August. (*See id.* at 117-23.) Cohen agreed to give Myers an additional $35,000 for the August meeting to handle the immigration matter and $50,000 to handle hotel problems with the local government. (*See id.* at 124-66.)

On the evening of January 25 Myers returned, at Cohen's request, to meet with him. ([Deleted]; *Myers* Gov't Trial Ex. 8A.) After a discussion of the circumstances that had led to Myers' reduced share of the August bribe (*see id.* at 2-12, 21-25), Cohen asked if Myers could arrange payoff meetings with [deleted] and Representative [deleted]. ([Deleted]) Myers agreed to try to arrange a meeting with [deleted], but he said that "[deleted] would not come to this kind of a meeting." ([Deleted])

Also on January 25 Weinberg telephoned John Stowe. (*See Jenrette* Gov't Trial Ex. 18C.) Stowe said that Representative Jenrette would be able to arrange a meeting at which Senator Thurmond would accept a bribe. (*See id.* at 2-3.) Stowe said that the meeting would have to be in Jenrette's home and that Senator Thurmond would not make explicit guarantees. (*See id.* at 3-4.) Jenrette told Weinberg later that evening that he had spoken to Senator Thurmond and that he would contact him again to schedule a meeting. (*See Jenrette* Gov't Trial Ex. 19C.) On the following morning DeVito telephoned Jenrette and asked him to try to schedule the meeting within one week. (*See Jenrette* Gov't Trial Ex. 20C.) Two days later Jenrette told DeVito that he had spoken to Senator Thurmond only "in a very vague way," but that he would not be able to produce Senator Thurmond for a meeting, and that the Senator would not accept money or give assurances in advance. (*Jenrette* Gov't Trial Ex. 21C, at 3; *see id.* at 2-5, 9-10.) On January 29 Stowe told Weinberg that Senator Thurmond would not make assurances in return for money, but would only accept money after he introduced the legislation. (*See Jenrette* Gov't Trial Ex. 22C.)

Cohen (Special Agent Wald) telephoned Representative Myers also on January 29 to ask about meeting [deleted]. ([Deleted]) Myers said that he had to discuss the proposal more thoroughly with [deleted] before scheduling a meeting. ([Deleted]) The next day Myers told Cohen that "there's a strong possibility" that Cohen would be able to meet [deleted] on January 31. ([Deleted]) On January 31 Myers told Cohen that [deleted] would participate and that Myers would arrange a meeting that evening. ([Deleted]) Later that day, Myers said that he was meeting [deleted] to discuss the proposal. ([Deleted]) Shortly thereafter Myers telephoned and said that [deleted] had agreed to participate and that the two of them were leaving immediately to meet Cohen. ([Deleted])

Myers introduced [deleted] to Cohen and Poulos and Cohen outlined the asylum scenario. ([Deleted]) Cohen expressed an interest in investing in coal projects in Pennsylvania and asked if [deleted] could use influence to assist with environmental regulation. ([Deleted]) After extensive discussion [deleted] said, "[W]e're not going to complete this in one meeting. Okay, I'd like to have more time with ya." ([Deleted]) Cohen asked whether he could be assured that [deleted] would vote favorably to Abdul Enterprises' interests. ([Deleted]) [deleted] responded, "[T]o be fair, I don't think I could say 'yes' at this point, because I don't know what you're asking." ([Deleted]) After Cohen mentioned money, [deleted] suggested that they postpone that discussion until another time. ([Deleted]) [deleted] left, and Cohen and Myers agreed to try to meet with [deleted] again in the future. ([Deleted])

On January 10 FBI HQ had approved January 31 as the date for termination of the covert phase of the Abscam investigation. ([Deleted]) By late January inquiries from NBC, the *New York Times,* and *Newsday* revealed that members of the press were becoming increasingly aware of details of the Abscam operation. (*See Jannotti* Pre-trial D.P. Tr. 2.23-.41, 2.191-.194.) Nevertheless, Department of Justice officials decided to prolong the covert phase until February 2. (*See id.* at 2.200-.201, 3.30-.37.)

In preparation for the termination of the covert operation, in late January Weinberg and the undercover agents began asking suspects for their anticipated whereabouts on February 2 and arranging meetings with them on that date. (*See e.g., Thompson* Gov't Trial Ex. 35A; [Deleted]; [Deleted]; *Thompson* Gov't Trial Ex. 36A; *Kelly* Gov't Trial Ex. 18C.)

FEBRUARY 1980

At noon on February 2 Criden met DeVito and Weinberg in a hotel room at the JFK Hilton in New York. (*See Thompson* Gov't Trial Ex. 37A.) Weinberg had arranged the meeting on the pretext that DeVito had money for Criden and that the sheik was arriving from overseas and wanted to meet him. (*See Thompson* Gov't Trial Ex. 35A.) Ostensibly while waiting for the sheik's arrival, Devito led Criden through a recital of the history of his dealings with Abdul Enterprises, from the origin of the asylum scenario through the meetings with Myers, Lederer, Thompson, Murphy, Murtha, Johanson, Schwartz, and Jannotti. (*See Thompson* Gov't Trial Ex. 37A, at 2-6, 11.) Criden said that "Murtha is ready to go by the way. * * * I got a call yesterday. He's ready to play." (*Id.* at 4; *see id.* at 11-13.) Criden also stated, "I can get five more [public officials] if you want 'em." (*Id.* at 6; *see id.* at 17.) Criden described his plans for handling Murphy's share of the shipping venture. (*See id.* at 6-7.) Instead of introducing Criden to the sheik, DeVito identified himself as FBI Agent Amoroso and introduced Criden to FBI Supervisor John Good and another agent, who interviewed Criden. (*See id.* at 18.)

Shortly thereafter at the hotel, DeVito and Weinberg met Stanley Weisz, who was expecting to receive $50,000 for the Kelly meeting. ([Deleted]) With William Rosenberg waiting nearby, DeVito gave Weisz the money. ([Deleted]) As Weisz left, he was stopped and questioned by FBI agents. (*See Kelly* Gov't Trial Exs. 7, 8, 9, 10.)

Also on February 2 FBI agents interviewed Representative Myers at his home, where he was expecting Poulos (Special Agent Haridopolos) to deliver $85,000. ([Deleted]) Myers denied knowing DeVito, Weinberg, or Cohen and denied having had business dealings with Criden. ([Deleted]) Simultaneously, according to plan, teams of FBI agents interviewed over 30 suspects of the investigation. ([Deleted]) On the evening of February 2, television news broadcasts carried the first detailed public reports of the Abscam investigation.

APPENDIX B

Senate Resolutions Regarding the Select Committee and Rules of Procedure of the Select Committee

III

97th CONGRESS
2d Session

S. RES. 350

Establishing a select committee to conduct an investigation of the activities of components of the Department of Justice in connection with their law enforcement undercover operations and to recommend such legislation as the committee deems necessary or desirable.

IN THE SENATE OF THE UNITED STATES

March 24 (legislative day, February 22), 1982

Mr. Baker (for himself, Mr. Robert C. Byrd, Mr. Stevens, and Mr. Cranston), submitted the following resolution; which was ordered held at the desk

March 25 (legislative day, February 22), 1982

Considered and agreed to

RESOLUTION

Establishing a select committee to conduct an investigation of the activities of components of the Department of Justice in connection with their law enforcement undercover operations and to recommend such legislation as the committee deems necessary or desirable.

Whereas, law enforcement undercover activities by components of the Department of Justice may fulfill a useful and beneficial purpose in the investigation and prosecution of crimes against the United States;

Whereas, allegations have been raised of improprieties in the formulation and conduct of the so-called ABSCAM undercover operation by components of the Department of Justice;

Whereas, these allegations specifically include the allegation that in the ABSCAM operation attempts were made to create improper conduct on the part of certain persons (including Members of Congress), including instances where no adequate basis may have existed for suspecting the person of prior improper activity or a predisposition to commit such activity;

Whereas, these allegations respecting investigative techniques further include questions of possible prosecutorial misconduct in connection with the ABSCAM operation;

Whereas, these allegations may further indicate a pattern of illegal or improper targeting and investigative techniques utilized by components of the Department of Justice in law enforcement undercover operations; and

Whereas, a thorough and independent investigation by the Senate of the United States is necessary to determine the facts with respect to targeting and investigative techniques utilized in connection with law enforcement undercover operations carried out by components of the Department of Justice generally and in connection with the ABSCAM operation specifically: Now, therefore, be it

Resolved, That it is the purpose of this resolution to establish a select committee of the Senate to conduct an investigation and study of the activities of components of the Department of Justice in connection with their law enforcement undercover operations or of any persons, acting individually or in combination with others, in connection with such operations, and to recommend such legislation as the committee deems necessary or desirable.

SEC. 2. (a) There is hereby established a select committee of the Senate, which may be called, for convenience of expression, the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice (hereinafter referred to as the "select committee"), to conduct an investigation and study of activities of components of the Department of Justice in connection with their law enforcement undercover operations or of any persons acting individually or in combination with others, in connection with such operations, and to recommend such legislation as the select committee deems necessary or desirable.

(b) The select committee shall consist of eight members of the Senate, four majority members of the Senate to be appointed by the President of the Senate upon the recommendation of the Majority Leader of the Senate, and four minority members of the Senate to be appointed by the President of the Senate upon the recommendation of the Minority Leader of the Senate. For the purposes of paragraph 4 of rule XXV of the Standing Rules of the Senate, service of a Senator as a member, chairman, or vice chairman of the select committee shall not be taken into account.

(c) The majority members of the select committee shall select a chairman, and the minority members of the select committee shall select a vice chairman, and the select committee shall adopt rules and procedures, not inconsistent with the rules and procedures of the Senate, to govern its proceedings, and to provide for the security of records, documents, information and other materials in its custody and of its proceedings, and to prevent unauthorized disclosure of information and materials disclosed to it in the course of its investigation and study. The vice chairman shall not assume the functions of acting chairman in the absence of the chairman, but shall preside over meetings of the select committee during the absence of the chairman, and shall discharge such other responsibilities as may be assigned to him by the select committee or the chairman. Vacancies in the membership of the select committee shall not affect the authority of the remaining members to execute the functions of the select committee and shall be filled in the same manner as original appointments to it are made.

(d) A majority of the members of the select committee shall constitute a quorum for the transaction of business, but the select committee may affix a lesser number as a quorum for the purpose of taking testimony before the select committee.

(e) In the event that a tie vote occurs, the pending matter then being voted upon shall be determined in accordance with the vote of the chairman.

SEC. 3. The select committee is authorized and directed to do everything necessary or appropriate to conduct the investigation and study specified in subsection (a) of section 2. Without restricting in any way the authority conferrred upon the select committee by the preceding sentence, the Senate further expressly authorizes and directs the select committee to make a complete investigation and study of the activities of components of the Department of Justice or of any or all persons who may have information bearing upon the jurisdiction of the select committee, with respect to the following matters:

(1) The alleged targeting by any component of the Department of Justice of particular individuals for law enforcement undercover activities without justification.

(2) The origin and initiation of such law enforcement undercover activities, including the standards applied in determining whether and with respect to whom such activities should be employed.

(3) Continuation or modification of previously initiated law enforcement undercover activities, including the standards applied in determining whether any such ongoing activities should be employed with respect to additional individuals.

(4) The standards for termination of such law enforcement undercover activities.

(5) The techniques employed in the course of such law enforcement undercover activities, including the standards applied in determining which techniques should be employed.

(6) The management, supervision, and direction of such law enforcement undercover activities and the decisionmaking process with respect thereto.

(7) The management, direction, supervision, and control of undercover agents, employees, and informants in such law enforcement undercover activities.

(8) The coordination between or among components of the Department of Justice in connection with such law enforcement undercover activities.

(9) The activities and responsibilities of prosecutors in connection with the investigation and prosecution of cases arising out of such law enforcement undercover activities.

(10) The effectiveness of, and need for further, executive branch guidelines in connection with such law enforcement undercover activities.

(11) The need for specific legislation to govern such law enforcement undercover activities.

(12) The possible violation of any state or United States statute or constitutional provision, or the possible violation of any rule or regulation by any component of the Department of Justice, in connection with such law enforcement undercover activities, and the extent to which innocent persons may have been harmed by such possible violations.

(13) The need for improved oversight by the executive branch and the Congress of such law enforcement undercover activities.

(14) The issue of whether the existing laws of the United States are adequate, either in their provisions or manner of enforcement, to safeguard the rights of American citizens, to accomplish appropriate executive branch and legislative branch control of such law enforcement undercover activities, and to give appropriate authorization for components of the Department of Justice to engage in law enforcement undercover activities.

(15) The effectiveness of, and need for further, executive branch procedures to investigate allegations made concerning illegal, improper or unethical conduct in connection with such law enforcement undercover activities.

(16) Such other related matters as the select committee deems necessary in order to carry out its responsibilities under section 2.

SEC. 4. (a) To enable the select committee to conduct investigations and studies into any matter within its jurisdiction, the Senate hereby empowers the select committee as an agency of the Senate (1) to employ and fix the compensation of such clerical, investigatory, legal, technical, and other assistants as it deems necessary or appropriate, but it may not exceed the normal Senate salary schedules; (2) to sit and act at any time or place during sessions, recesses, and adjournment periods of the Senate; (3) to hold hearings for taking testimony on oath or to receive documentary or physical evidence relating to the matters and questions it is authorized to investigate or study; (4) to require by subpoena or otherwise the attendance as witnesses before the select committee or at depositions of any persons who may have knowledge or information concerning any of the matters the select committee is authorized to investigate and study; (5) to require by subpoena or order any department, agency, officer, or employee of the executive branch of the United States Government, or any person, firm, corporation, or entity to produce for its consideration or for use as evidence in the select committees' investigation and study any books, checks, canceled checks, correspondence, communications, documents, papers, physical evidence, records, recordings, tapes, or materials relating to any of the matters it is authorized to investigate and study which they or any of them may have in their custody or under their control; (6) to make to the Senate any recommendations the select committee deems appropriate with respect to the failure or refusal of any person to answer questions or give testimony before it or in a deposition or with respect to the failure or refusal of any officer or employee of the executive branch of the United States Government or any person, firm, corporation, or entity, to produce before the select committee any books, checks, canceled checks, correspondence, communications, documents, financial records, papers, physical evidence, records, recordings, tapes, or materials in obedience to any subpoena or order; (7) to take depositions and other testimony under oaths administered by a member or a person otherwise authorized by law to administer oaths; (8) to procure the temporary or intermittent services of individual consultants, or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 202(i) of the Legislative Reorganization Act of 1946; (9) to use on a reimbursable basis, with the prior consent of the Committee on Rules and Administration, the services of personnel of any department or agency of the United States; (10) to use on a reimbursable basis or otherwise, with the prior consent of the chairman of any committee, or of any subcommittee of any committee of the Senate, facilities or services of any members of the staffs of such other Senate committees or subcommittees, whenever the select committee or its chairman deems that such action is necessary or appropriate to enable the select committee to conduct the investigation and study authorized and directed by this resolution; (11) to have direct access through the agency of its members or staff, when and as designated by the select committee, to any data, evidence, information, report, analysis, or document or paper, relating to any of the matters or questions which it is authorized and directed to investigate and study which is in the custody or under the control of any department, agency, officer, or employee of the executive branch of the United States Government, without regard to the jurisdiction or authority of any other Senate committee, and which will aid the select committee to prepare for or conduct the investigation and study authorized and directed by this resolution, and (12) to expend to the extent it determines necessary or appropriate any moneys made available to it by the Senate to perform the duties and exercise the powers conferred upon it by this resolution and to conduct the investigation and study authorized and directed by this resolution to conduct.

(b) Subpoenas may be authorized and issued by the select committee acting through the chairman or any other member designated by him; and may be served by any persons designated by such chairman or other member anywhere within the borders of the United States. The chairman of the select committee, or any other member thereof, is hereby authorized to administer oaths to any witnesses appearing before the committee.

(c) In preparing for or conducting the investigation and study authorized and directed by this resolution, the select committee shall be empowered to exercise the powers conferred upon committees of the Senate by section 6002 of title 18, United States Code, or any other Act of Congress regulating the granting of immunity to witnesses.

(d) To assist the select committee in its investigation and study, the Senate Legal Counsel and Deputy Counsel are authorized and directed to work with and under the jurisdiction and authority of the select committee chairman and vice chairman.

(e) To assist the select committee in its investigation and study, the chairman shall appoint a committee chief counsel and the vice chairman shall appoint a committee deputy chief counsel. All clerical, investigatory, legal, technical, and other personnel who assist the select committee in its investigation and study shall provide such assistance pursuant to the direction and control of the committee chief counsel and the committee deputy chief counsel.

SEC. 5. The select committee shall have authority to recommend the enactment of any new legislation or the amendment of any existing statute which it considers necessary or desirable in accordance with its findings.

SEC. 6. The select committee shall make a final report of the results of the investigation and study conducted by it pursuant to this resolution, together with its findings and its recommendations as to new congressional legislation or any administrative or other action it deems necessary or desirable, to the Senate at the earliest practicable date, but no later than December 15, 1982. The select committee may also submit to the Senate such interim reports as it considers appropriate. After submission of its final report, the select committee shall have until January 15, 1983, to close its affairs, and on such date shall cease to exist.

SEC. 7. The expenses of the select committee through December 15, 1982, shall not exceed $250,000. Such expenses shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the select committee.

S. Res. 485

In the Senate of the United States,

September 29 (legislative day, September 8), 1982.

Whereas on March 25, 1982, the Senate adopted S. Res. 350, thereby establishing the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice (hereinafter referred to as the Select Committee) to conduct an investigation and study of activities of components of the Department of Justice in connection with their law enforcement undercover operations generally, and the ABSCAM operation specifically;

Whereas the Select Committee has received conflicting evidence regarding the distribution of funds paid by undercover operatives of the Government as purported bribes to public officials in the ABSCAM operation;

Whereas in order to investigate the substance of these disputes it is necessary for the select committee to inspect and to receive tax returns, return information, and tax-related material, held by the Secretary of the Treasury;

Whereas information necessary for such investigation cannot reasonably be obtained from any other source; and

Whereas under subsections 6103(f)(3) and 6103(f)(4)(B) of the Internal Revenue Code of 1954, as amended, a committee of the Senate has the right to inspect tax returns if such committee is specifically authorized to investigate tax returns by resolution of the Senate: Now, therefore, be it

Resolved, That the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice is authorized, in addition to S. Res. 350, to inspect and to receive for tax years 1979 and 1980 any tax return (including amended returns), return information, or other tax-related material, held by the Secretary of the Treasury, related to ABSCAM defendants Angelo J. Errichetti, Howard L. Criden, and Louis C. Johanson, including any trusts, sole proprietorships, partnerships, corporations, and other business entities, other than publicly held corporations, in which the above named individuals have a beneficial interest, and for tax years 1977 through 1981 any tax return (including amended returns), return information, or other tax-related information, held by the Secretary of the Treasury, related to ABSCAM cooperating witness Melvin Weinberg, his late wife, Cynthia Marie Weinberg, and his present wife, Evelyn Knight or Evelyn Weinberg, including any trusts, sole proprietorships, partnerships, corporations, and other business entities, other than publicly held corporations, in which the above named individuals have a beneficial interest, and any other tax return (including amended returns), return information, or other tax-related material held by the Secretary of the Treasury related to the above-named individuals that the

Select Committee determines may contain information directly relating to its investigation and otherwise not obtainable.

Attest:

Secretary.

97TH CONGRESS
2D SESSION

S. RES. 517

Relating to funding of the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice.

IN THE SENATE OF THE UNITED STATES

DECEMBER 15 (legislative day, NOVEMBER 30), 1982

Mr. STEVENS (for Mr. MATHIAS) submitted the following resolution; which was considered and agreed to

---

RESOLUTION

Relating to funding of the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice.

Resolved, That the first sentence of section 7 of S. Res. 350, Ninety-seventh Congress, agreed to March 25, 1982, is amended by striking out "December 15, 1982," and inserting in lieu thereof "January 15, 1983,".

FILING THE FINAL REPORT OF THE SELECT COMMITTEE TO STUDY LAW ENFORCEMENT UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE

Mr. MATHIAS. Mr. President, this being the 15th of December, it is a day which, under Senate Resolution 350, the Select Committee To Study Law Enforcement Undercover Activities of Components of the Department of Justice will file a report before the end of this session.

I ask unanimous consent that the full version of the report, including citation to confidential documents, and other sensitive materials, be filed with the Office of National Security Information, simultaneously with the filing with the Secretary of the Senate, and that this full version not be released except to members of the select committee, until further order of the Senate; and

That the chairman and vice chairman of the select committee be authorized to take all actions subsequent to December 15, 1982, which are necessary to complete the mission of the select committee, including but not limited to the following:

First, to arrange for the subsequent printing and distribution of the public version of the select committee's final report;

Second, to approve editorial corrections to the text of the final report; and

Third, to provide for the proper disposition of confidential documents furnished to the select committee by components of the Department of Justice for use in the select committee's investigation.

The PRESIDING OFFICER. Without objection, it is so ordered.

RULES OF PROCEDURE OF THE SENATE SELECT COMMITTEE TO STUDY LAW ENFORCEMENT UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE

(Adopted April 14, 1982; published in the Congressional Record April 15, 1982)

RULE 1. CONVENING OF MEETINGS AND HEARINGS

1.1 *Meetings*. The committee shall hold its regular meetings every Wednesday when the Senate is in session. The chairman may call additional meetings or cancel regular meetings. The members of the committee may call special meetings as provided in Senate Rule XXVI(3).

1.2 *Notice*. The committee shall make public announcement of the date, place, and subject matter of any hearing at least one week before its commencement. A hearing may be called on shortened notice if the chairman, with the concurrence of the vice chairman, determines that there is good cause to begin such hearing at an earlier date.

1.3 *Presiding Officer*. The chairman shall preside when present. If the chairman is not present at any meeting or hearing, the vice chairman shall preside. The chairman may designate any member of the committee to preside over the conduct of a meeting or hearing in the absence of the chairman or vice chairman.

RULE 2. CLOSED SESSIONS AND CONFIDENTIAL MATERIALS

2.1 *Procedure*. All meetings and hearings shall be open to the public unless closed. To close a meeting or hearing or portion thereof, a motion shall be made and seconded to go into closed session to discuss whether the meeting or hearing will concern the matters enumerated in Rule 2.3. Immediately after such discussion the committee shall return to open session and the meeting or hearing may then be closed by a record vote, including proxy votes, in open session of a majority of the members of the committee.

2.2 *Witness Request*. Any witness called for a hearing may submit a written request to the chairman no later than twenty-four hours in advance for his examination to be in closed or open session. The chairman shall inform the committee of any such request, and the committee shall take such action pursuant to Rule 2.1 as it deems appropriate.

2.3 *Closed Session Subjects*. A meeting or hearing or portion thereof may be closed if the matters to be discussed concern: (1) national security; (2) committee staff personnel or internal staff management or procedure; (3) matters tending to reflect adversely on the character or reputation or to invade the privacy of any individuals; (4) matters which will disclose the identity of any informer or undercover law enforcement agent or will disclose any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement; or (5) other matters enumerated in Senate Rule XXVI(5) (b).

2.4 *Broadcasting*.

(a) *Control*. Any meeting or hearing open to the public may be covered by television, radio, or still photography. Such coverage must be conducted in an orderly and unobtrusive manner, and the presiding officer may for good cause terminate such coverage in whole or in part, or take such other action to control it as the circumstances may warrant.

(b) *Request*. A witness may request of the presiding officer on grounds of distraction, harassment, personal safety, or physical discomfort, that during his testimony cameras, media microphones, and lights shall not be directed at him, and the presiding officer may take such action as he deems appropriate in response to the request.

RULE 3. QUORUMS AND VOTING

3.1 *Reporting*. Five members shall constitute a quorum for reporting a matter or recommendation to the Senate. A quorum must be physically present at the time of the final vote on reporting.

3.2 *Other Committee Business*. Three members shall constitute a quorum for the conduct of any committee business other than a final vote on reporting, providing a member of the minority is present. One member shall constitute a quorum for hearing testimony.

3.3 *Proxies*. Proxies shall be in writing, and shall be filed with the chief clerk by the absent member or by a member present at the meeting. Proxies shall contain sufficient reference to the pending matter to show that the absent member has been informed of it and has affirmatively requested that he be recorded as voting on it. Proxies shall not be counted towards a quorum.

3.4 *Polling*.

(a) *Subjects*. The committee may poll only (1) internal committee matters including the committee's staff, records, and budget; (2) authorization for steps in the investigation, including the authorization and issuance of subpoenas, applications for immunity orders, and requests for documents from agencies; (3) other committee business, not including a final vote on reporting to the Senate, which has been designated for polling at a meeting.

(b) *Procedure*. The chairman shall circulate polling sheets to each member specifying the matter being polled and the time limit for completion of the poll. If any member so requests, the matter shall be held for meeting rather than being polled. The chief clerk shall keep a record of polls; if the chairman, with the approval of a majority of the members, determines that the polled matter is in one of the areas enumerated in Rule 2.3, the record of the poll shall be confidential. Any member may move at the committee meeting following a poll for a vote on the polled decision.

RULE 4. SUBPOENAS

4.1 *Authorization*. Subpoenas may be authorized by the committee or by the chairman, and may be issued by the chairman or by any other member designated by him. The chief clerk shall keep a log, and a file, of all subpoenas issued by the committee.

4.2 *Return*. A subpoena duces tecum or order to an agency for documents may be issued whose return shall occur at a time and place other than that of a scheduled hearing. When a return on such a subpoena or order is incomplete or accompanied by an objection, the chairman may convene a meeting or hearing on shortened notice to determine the adequacy of the return and to rule on the objection, or may refer the issues raised by the return for decision by poll of the committee. At a meeting or hearing on such a return, one member shall constitute a quorum.

RULE 5. HEARINGS

5.1 *Notice.* Witnesses called before the committee shall be given at least 48 hours notice absent a determination by the chairman of extraordinary circumstances, and all witnesses called shall be furnished with a copy of Senate Resolution 350 and of these rules.

5.2 *Oath.* All witnesses who testify to matters of fact shall be sworn unless the committee votes to waive the oath. The chairman, or any member, shall administer the oath.

5.3 *Statement.* Any witness desiring to make an introductory statement shall file 3 copies of such statement with the chairman or clerk of the committee 48 hours in advance of his appearance, unless the chairman and vice chairman determine that there is good cause for a witness's failure to do so. A witness may be required to summarize his or her prepared statement if it exceeds ten minutes.

5.4 *Counsel.*

(a) *Presence.* A witness's counsel shall be permitted to be present during his testimony at any public or closed hearing or deposition or staff interview to advise such witness of his rights; provided, however, that in the case of any witness who is an officer or employee of the government, or of a corporation or association, the chairman or the committee may rule that representation by counsel from the government, corporation, or association or by counsel representing other witnesses, creates a conflict of interest, and that the witness shall be represented by personal counsel not from the government, corporation or association or not representing other witnesses.

(b) *Indigence.* A witness who is unable for economic reasons to obtain counsel may inform the committee at least 48 hours prior to the witness's appearance, and it will endeavor to obtain volunteer counsel for the witness. Such counsel shall be subject solely to the control of the witness and not the committee. Failure to obtain counsel will not excuse the witness from appearing and testifying.

(c) *Conduct.* Counsel shall conduct themselves in an ethical and professional manner. Failure to do so shall, upon a finding to that effect by a majority of the members present, subject such counsel to disciplinary action, which may include warning, censure, or ejection. If counsel is disciplined, the provisions of Rule 5.4(b) for a witness who is unable to obtain new counsel shall apply.

5.5 *Transcript.* An accurate electronic or stenographic record shall be kept of the testimony of all witnesses in closed and public hearings. Upon his request and at his expense, a copy of or access to a copy of a witness's testimony in public or closed session shall be provided to the witness. Upon inspecting his transcript, within a time limit set by the committee clerk a witness may request changes in the transcript to correct errors of transcription, grammatical errors, and obvious errors of fact; the chairman or a staff officer designated by him shall rule on such requests.

5.6 *Impugned Persons.* Any person who believes that evidence presented, or comment made by a member or staff, at a public hearing or at a closed hearing concerning which there have been public reports, tends to impugn his character or adversely affect his reputation may:

(a) file a sworn statement of facts relevant to the evidence or comment, which shall be placed in the hearing record;

(b) request the opportunity to appear personally before the committee to testify in his own behalf; or

(c) submit questions in writing which he requests be used for the cross-examination of witnesses called by the committee. The chairman shall inform the committee of such requests for appearance or cross-examination. If the committee so decides, the requested questions, or paraphrased versions or portions of them, shall be put to the other witnesses by a member or by staff.

5.7 *Additional Witnesses.* Any three members of the committee shall be entitled, upon request made to the chairman, to call additional witnesses or to require the production of documents during at least one day of hearing. Such request must be made before the completion of the hearing or, if subpoenas are required, no later than three days before the completion of the hearing.

RULE 6. DEPOSITIONS AND EXAMINATION OF RECORDS

6.1 *Notice.* Notices for the taking of depositions shall be authorized and issued by the chairman or by a staff lawyer designated by him. Such notices shall specify a time and place for examination, and the name of the staff lawyer or lawyers who will take the deposition. Unless otherwise specified, the deposition shall be in private. The committee shall not initiate procedures leading to criminal or civil enforcement proceedings for a witness's failure to appear unless the deposition notice was accompanied by a subpoena authorized by the committee or the chairman.

6.2 *Counsel.* Witnesses may be accompanied at a deposition by counsel to advise them of their rights, subject to the provisions of Rule 5.4.

6.3 *Procedure.* Witnesses shall be examined upon oath administered by a member or an individual authorized by local law to administer oaths. Questions shall be propounded orally by staff lawyers. Objections by the witness as to the form of questions shall be noted for the record. If a witness objects to a question and refuses to testify on the basis of relevance or privilege, the committee staff may proceed with the deposition, or may, at that time or at a subsequent time, seek a ruling by telephone or otherwise on the objection from the chairman of the committee or a member designated by him. If the chairman or designated member overrules the objection, he may refer the matter to the committee or he may order and direct the witness to answer the question, but the committee shall nôt initiate procedures leading to civil or criminal enforcement unless the witness refuses to testify after he has been so ordered and directed to answer.

6.4 *Filing.* The committee staff shall see that the testimony is transcribed or electronically recorded. If it is transcribed, the witness shall be furnished with a copy or access to a copy for review. No later than five days thereafter, if a copy is provided the witness shall return it with his or her signature, and the staff may enter the changes, if any, requested by the witness in accordance with Rule 5.5. If the witness fails to return a signed copy the staff shall note on the transcript the date a copy was provided and the failure to return it. The individual administering the oath shall certify on the transcript that the witness was duly sworn in his presence, the transcriber shall certify that the transcript is a true record of the testimony, and the transcript shall then be filed with the committee clerk. Committee staff may stipulate with the witness to changes in this procedure. Objections to errors in this procedure which might be cured if promptly presented are waived unless timely objection thereto is made.

6.5 *Examination of Records.* The committee or the chairman may authorize the staff to inspect locations or systems of records on behalf of the committee.

RULE 7. PROCEDURES FOR HANDLING OF SENSITIVE OR CONFIDENTIAL MATERIALS

7.1 *Security.* Committee offices shall operate under strict security precautions. The chairman may request the Senate Sergeant at Arms to provide assistance necessary to insure strict security.

7.2 *Sensitive or Confidential Materials.* The chairman may designate categories of sensitive or confidential materials, which shall be segregated in a secure storage area. The chairman may also enter into agreements to obtain materials and information under assurances concerning confidentiality. Each member of the committee shall be notified of such agreements.

7.3 *Access.* Members may designate individuals on their staffs to have access to committee materials subject to the rules concerning nondisclosure applicable to committee staff. Staff access to materials may be limited by the chairman and vice chairman or by staff officers designated by them to protect the confidentiality of materials.

7.4 *Nondisclosure.* No testimony taken including the names of witnesses testifying, or material presented, in depositions or at closed hearings, and no confidential materials or information, shall be made public, in whole or in part or by way of summary, or disclosed to anyone outside the committee and individuals designated on members' staffs, unless authorized by the committee or the chairman. Allegations concerning unauthorized disclosure may be resolved by the committee or may be referred by a majority vote of the committee to the Select Committee on Ethics. The employment of any member of the staff who fails to conform to these rules may be immediately terminated.

RULE 8. STAFF

8.1 *Detailees and Consultants.* The chairman shall have authority to use on a reimbursable basis, with the prior consent of the Committee on Rules and Administration, the services of personnel of any department or agency of the United States and shall have authority to procure the temporary or intermittent services of individual consultants or organizations.

8.2 *Applicability of Rules.* For purposes of Rules 6 and 7 of these rules, the officers and employees of the Office of Senate Legal Counsel shall be deemed committee staff.

RULE 9. EFFECTIVE CHANGES IN RULES

9.1 These rules shall become effective upon publication in the Congressional Record. These rules may be modified, amended, or repealed by the committee, provided that all members are present or provide proxies or if a notice in writing of the proposed changes has been given to each member at least 48 hours prior to the meeting at which action thereon is to be taken. The changes shall become effective immediately upon publication of the changed rule or rules in the Congressional Record, or immediately upon approval of the changes if so resolved by the committee so long as any witnesses who may be effected by the change in rules are provided with them.

APPENDIX C

CORRESPONDENCE REGARDING THE SELECT COMMITTEE'S ACCESS TO DEPARTMENT OF JUSTICE DOCUMENTS

CHARLES McC. MATHIAS, JR., MD., CHAIRMAN
WALTER D. HUDDLESTON, KY., VICE CHAIRMAN
JAMES A. McCLURE, IDAHO
ALAN K. SIMPSON, WYO.
WARREN B. RUDMAN, N.H.
DANIEL K. INOUYE, HAWAII
DENNIS DeCONCINI, ARIZ.
PATRICK J. LEAHY, VT.

United States Senate
SELECT COMMITTEE TO STUDY LAW ENFORCEMENT
UNDERCOVER ACTIVITIES OF COMPONENTS OF THE
DEPARTMENT OF JUSTICE
(PURSUANT TO S. RES. 350, 97TH CONGRESS)
WASHINGTON, D.C. 20510

May 25, 1982

The Honorable William H. Webster
Director, Federal Bureau of Investigation
J. Edgar Hoover Building
Ninth and Pennsylvania Sts., N. W.
Washington, D. C. 20535

Dear Director:

As a result of conferences between the staff of this Committee and representatives of the Federal Bureau of Investigation, it is my understanding that you have agreed to provide the Committee information respecting undercover operations conducted by the FBI, specifically including information concerning the undercover operations known as ABSCAM. Indeed, counsel to this Committee have advised the Committee that, as far as your organization is concerned, all FBI records relevant to our investigation will be made available to us, subject to appropriate protection of ongoing investigations, existing informants, and sensitive techniques relating to such ongoing investigations.

To commence implementation of this agreement, we hereby request that, as soon as possible, the FBI provide the Committee all existing material that is in the possession of your organization and included in the following categories:

1. All documents that led to the existing guidelines on undercover operations, including material reflecting the FBI undercover practices and procedures before the guidelines were formally adopted;

2. all documents reflecting communication in the ABSCAM investigation between any two or more FBI employees or agents, including communications between agents in the field (such as Agent Amoroso and

Agent Good), on the one hand, and officials in FBI Headquarters (to and including the Director), on the other;

3. communications between the FBI and the Department of Justice relating to ABSCAM; and

4. all transcripts of audio and video tapes generated in the ABSCAM investigation.

We recognize that not all of the above material can be produced at once, and we understand that your representatives and counsel to this Committee will set priorities and procedures for the orderly transfer of materials designated in this letter.

Thank you for your cooperation.

Sincerely,

Charles McC. Mathias, Jr.
Chairman

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

May 26, 1982

Honorable Charles McC. Mathias, Jr.
Chairman, Select Committee to Study Law
  Enforcement Undercover Activities of
  Components of the Department of Justice
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is to acknowledge receipt of your letter to me dated May 25, 1982, requesting documents regarding Abscam and the FBI's undercover practices and procedures. Subject to appropriate protection of ongoing investigations, informants, and sensitive techniques, the documents you have requested will be provided to the Committee as soon as possible.

I am informed that your General Counsel has stated that in order to prevent unwarranted invasion of privacy or damage to sensitive political reputations, disclosure in some instances may, upon agreement, be limited to members of the Committee, the General Counsel, and the Deputy Counsel. I concur in this responsible approach.

Sincerely,

William H. Webster

William H. Webster
Director

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

June 8, 1982

James F. Neal, Esq.
Malcolm E. Wheeler, Esq.
Room 309
Russell Senate Office Building
Washington, D.C. 20510

Dear Messrs. Neal and Wheeler:

This letter is in response to your request for access to certain Department of Justice and court materials in connection with your Committee's work. You requested access to four categories of materials: (1) public materials from the various Abscam cases; (2) non-public materials from those cases; (3) undercover guidelines of the Department of Justice and its various components, together with backup material generated in the course of preparing those guidelines; and (4) materials from the Department's Office of Professional Responsibility relating to the discipline of any Department of Justice personnel involved in Abscam. The following is our response to your requests for each of these categories:

(1) The public Abscam case materials that you have requested have been provided to you through the Office of the Senate Legal Counsel. It is my understanding that the production of these materials is almost complete, and that the last of these materials should be in your hands by the week of June 7, 1982.

(2) The non-public Abscam case materials will be provided to you subject to the following conditions:

(a) that court permission is obtained to disclose those materials that we cannot disclose without a court order; we, of course, would fully cooperate in this endeavor.

(b) that the materials disclosed and produced to you will be maintained under a pledge of confidentiality on your part, under which you will agree to limit disclosure of these materials to the two counsel to the Committee and the members of the Committee;

(c) that copies of the non-public court materials will be produced to you, except for Myers Due Process Exhibits 63 and 65 (the Brooklyn-Queens and Headquarters FBI Abscam files). We will request that you review those voluminous files at FBI Headquarters. If, upon review of these files, you wish to have copies of particular items from the files, we will prepare copies of those materials unless they are highly sensitive in nature.

(d) that the disclosure of some portions of these and other materials may be denied if the materials would compromise an ongoing investigation or reveal sensitive sources or techniques, as this term has been explained to you.

(3) The undercover guidelines and backup materials will be provided to you subject to the pledge of confidentiality described above with respect to all non-public materials.

(4) You will receive substantially all the documents in the files of the Office of Professional Responsibility (OPR) through the document production under categories one, two and three above. However, a very small number of documents, generated by OPR during the course of its activities, are uniquely privileged. These documents consist of attorney work product and sensitive deliberative memoranda. Therefore, they contain information, conclusions and recommendations designed to assist the Attorney General in maintaining high standards of conduct among Department of Justice employees. We have uniformly resisted production of such documents to any persons or body and the federal courts have routinely upheld our claims of privilege.

Nevertheless, as to this small number of documents, I feel confident that we can strike an accommodation acceptable to all of us. I suggest that we revisit this issue, if that is necessary, after you have reviewed the other documents produced.

We will continue our efforts to cooperate with your inquiry, both in providing access to the materials discussed above and in providing you with any other assistance you need. I am confident that we will be able to furnish sufficient information and documentation to enable the committee to carry out its responsibilities. If you wish to discuss this response or any other matters, please do not hesitate to contact me.

Sincerely,

Rudolph W. Giuliani

Rudolph W. Giuliani
Associate Attorney General

CHARLES MC C. MATHIAS, JR., MD., CHAIRMAN
WALTER D. HUDDLESTON, KY., VICE CHAIRMAN

JAMES A. MC CLURE, IDAHO
ALAN K. SIMPSON, WYO.
WARREN B. RUDMAN, N.H.

DANIEL K. INOUYE, HAWAII
DENNIS DE CONCINI, ARIZ.
PATRICK J. LEAHY, VT.

United States Senate
SELECT COMMITTEE TO STUDY LAW ENFORCEMENT
UNDERCOVER ACTIVITIES OF COMPONENTS OF THE
DEPARTMENT OF JUSTICE
(PURSUANT TO S. RES. 350, 97TH CONGRESS)
WASHINGTON, D.C. 20510

June 14, 1982

Rudolph W. Guiliani, Esq.
Associate Attorney General
U. S. Department of Justice
Washington, D. C. 20530

Dear Mr. Guiliani:

Pursuant to our discussions with representatives of the Department of Justice on June 10-12, 1982, this letter responds to your letter of June 8, 1982.

As your letter indicates, we have requested copies of four categories of materials: (1) all public material from the various Abscam cases; (2) all nonpublic material from those cases; (3) all Department of Justice guidelines regarding undercover activities, together with all backup documents related to the adoption, drafting, amendment, implementation, criticism or approval thereof; and (4) all material from the Department of Justice's Office of Professional Responsibility regarding charges of misconduct in the Executive Branch (FBI, United States Attorneys, and others) in the Abscam operation and prosecutions. We also have requested other specific documents and categories of documents: but we are prepared to discuss those additional requests at a later date and to finalize in this correspondence our agreement with respect to the four categories enumerated above. We understand, as well, that most of those additional requests are subsumed under the four categories enumerated above.

For ease of reference the subject matter of the immediately following paragraphs is organized into paragraphs numbered parallel to the numbered paragraphs in your letter of June 8, 1982.

(1) We acknowledge receipt of a substantial quantity of public Abscam case materials provided by the Department of Justice to us through the Office of the Senate Legal Counsel. It is our understanding that a few of the Government's trial exhibits and due process hearing exhibits from various cases will be forthcoming in the near future and that the Department of Justice will assist us in obtaining the several defense exhibits we do not now have.

(2) We acknowledge your offer to provide to us the nonpublic Abscam material, and we confirm that, pursuant to our discussions with representatives of the Department of Justice on June 10-12, 1982, that material will be provided subject to the following conditions.

> (a) Material that cannot properly be provided to us without a court order in one or more of the Abscam cases will not be provided unless the necessary order is first obtained; the Department of Justice will immediately, if it has not already commenced doing so, take all steps needed to obtain every such order that may be required; to the extent that any action by us or by the Select Committee may be needed to assist you in obtaining any such order, the Department of Justice will promptly notify us of that fact.
>
> (b) The nonpublic material disclosed to us will be maintained under a pledge of confidentiality on our part, as follows:
>
> > (i) the documents that are provided to us will be kept in a secured room, with access to those documents limited to (A) the document custodians (who have no investigative or decision-making responsibility)--Donna Phillips, Donna Wheeler, Margaret Blackston--(B) members of the Select Committee, and (C) the two counsel to the Select Committee;
> >
> > (ii) the persons described in subparagraph (i) above will not disclose any nonpublic document or the source thereof; provided, however, that (A) members of the Select Committee and the two counsel to the Select Committee may use and disclose, in furtherance of the Select Committee's mandate, the basic factual information, such as names, dates, places and events, contained in those documents and may state that such information was obtained from Department of Justice files; (B) the Select Committee and its two counsel reserve the right to seek to convince the Department of Justice to waive the pledge of confidentiality as to any particular document; and (C) the Select Committee reserves every right it has or, in the absence of this letter, would have had, to compel the unrestricted production or disclosure of any document by the Department of Justice to the Select Committee.

(c) Copies of the nonpublic Abscam material will be produced to us, except that we (Messrs. Neal and Wheeler) will review Myers Due Process Exhibits 63 and 65 at FBI Headquarters; and, if we then request copies of specific portions of those two exhibits, the Department of Justice will provide the requested copies, unless they are highly sensitive in nature.

(d) The Department of Justice may in the first instance deny us access to specific nonpublic materials when, in the opinion of the Department, such access would compromise an ongoing investigation or reveal sensitive sources or techniques; but, if access is so denied in the first instance, the Department will generally describe to us each document thus withheld, state the basis for the denial of access, and give us an opportunity to discuss further conditions under which access to the document or to a portion thereof might be provided.

(3) We confirm that the various Department of Justice guidelines regarding undercover activities, together with all backup documents, will be provided to us, with all nonpublic materials being subject to the pledge of confidentiality described above.

(4) We confirm that the Department of Justice will provide to us the material requested from the Department's Office of Professional Responsibility, except that documents considered by the Department to be uniquely privileged--attorney work product and sensitive deliberative memoranda--may in the first instance be withheld: provided, however, that the Department will generally describe each such document withheld, state the reason for its being withheld, and give us an opportunity to discuss further conditions under which we might have access to the document.

We appreciate your indicated willingness, as described above, to assist the Select Committee in its inquiry. We look forward to obtaining and reviewing documents early in the week of June 14, 1982.

To confirm that this letter accurately reflects the conditions under which material in the four document categories described in the first paragraph of this letter will be produced, please sign and return to us the enclosed copy of this letter.

Yours truly,

Malcolm E. Wheeler

Malcolm E. Wheeler
Deputy Chief Counsel

MEW:dg
Enclosure

CHARLES MC C. MATHIAS, JR., MD., CHAIRMAN
WALTER D. HUDDLESTON, KY., VICE CHAIRMAN
JAMES A. MC CLURE, IDAHO
ALAN K. SIMPSON, WYO.
WARREN B. RUDMAN, N.H.
DANIEL K. INOUYE, HAWAII
DENNIS DE CONCINI, ARIZ.
PATRICK J. LEAHY, VT.

United States Senate

SELECT COMMITTEE TO STUDY LAW ENFORCEMENT
UNDERCOVER ACTIVITIES OF COMPONENTS OF THE
DEPARTMENT OF JUSTICE

(PURSUANT TO S. RES. 350, 97TH CONGRESS)

WASHINGTON, D.C. 20510

June 15, 1982

The Honorable William H. Webster
Director, Federal Bureau of Investigation
J. Edgar Hoover Building
Ninth and Pennsylvania Sts., N.W.
Washington, D. C. 20535

Dear Director:

As you will recall, the Senate's directions to this Committee include a mandate to study undercover operations of the FBI. Therefore, it is the sense of the Committee that it should review, to a degree consistent with time and monetary restraints, several FBI undercover operations in addition to ABSCAM.

In order to start on this aspect of the Committee's work, we request that you provide the Committee's counsel with documents from the FBI files reflecting (a) applications for, (b) approval of, (c) communications between FBI Headquarters and the Department of Justice concerning, and (d) critiques of, the following undercover operations:

1. LABOU,
2. FRONTLOAD,
3. GAMSCAM (BUY-IN), and
4. An undercover operation selected by the FBI.

Counsel have advised the Committee that, based on prior testimony of yourself and of other representatives of the FBI, the documentation we are requesting herein does exist and would give us at least an overview of these undercover operations.

Please let us hear from you at your earliest convenience.

Sincerely,

Charles McC. Mathias, Jr.
Chairman

U.S. Department of Justice

Washington, D.C. 20530

June 17, 1982

James F. Neal, Esq.
Malcolm E. Wheeler, Esq.
Room 309
Russell Senate Office Building
Washington, D.C. 20510

Dear Messrs. Neal and Wheeler:

This letter is in further response to your request for access to certain Department of Justice and court materials in connection with your Committee's work. You requested access to four categories of materials: (1) public materials from the various Abscam cases; (2) non-public materials from those cases; (3) undercover guidelines of the Department of Justice and its various components, together with certain material generated in the course of preparing those guidelines; and (4) materials from the Department's Office of Public Responsibility relating to the discipline of any Department of Justice personnel involved in Abscam. The following is our response to your requests for each of these categories:

(1) The public Abscam case materials that you have requested include all transcripts of the eight Abscam trials, all exhibits in the possession of the government, and all pleadings pertinent to due process claims raised in those cases. We have now completed the production of these materials. We agree, however, to produce any additional such materials we may discover, to produce any additional such materials that may be filed by the parties in any of the Abscam cases, and to assist the Committee in locating those defense exhibits that the Committee does not now have.

(2) We agree to provide you with access to the non-public materials that were before any one of the Abscam courts, with the exception of materials that are barred from disclosure under the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure. We will provide you with access to these materials under the following conditions:

(a) Material that cannot properly be provided to you without a court order in one or more of the Abscam cases will not be provided unless the necessary order is first obtained: the Department of Justice will immediately take all steps needed to obtain every such order that may be required; to the extent that any action by you or by the Select Committee may be needed to assist us in obtaining any such order, the Department will promptly notify you of that fact.

(b) The non-public material disclosed to you will be maintained under a pledge of confidentiality on your part, as follows:

(i) the documents that are provided to you will be kept in a secure room, with access to those documents limited to (A) the document custodians (who have no investigative or decisionmaking responsibility) -- Donna Phillips, Donna Wheeler, Margaret Blackston -- (B) members of the Select Committee, and (C) the two counsel to the Select Committee;

(ii) the persons described in subparagraph (i) above will not disclose any nonpublic document or the source thereof; provided, however, that (A) members of the Select Committee may use and disclose, in furtherance of the Select Committee's mandate, the basic factual information, such as names, dates, places and events, contained in those documents and may state that such information was obtained from Department of Justice files; (B) the Select Committee and its two counsel reserve the right to seek to convince the Department of Justice to waive the pledge of confidentiality as to any particular document; and (C) the Select Committee reserves every right it has or, in the absence of this letter, would have had, to compel the unrestricted production or disclosure of any document by the Department of Justice to the Select Committee.

(c) Copies of the nonpublic Abscam material will be produced to you except that you (Messrs. Neal and Wheeler) will review Myers Due Process Exhibits 63 and 65 at FBI Headquarters; and, if you then request copies of specific portions of those two exhibits, the Department of Justice will provide the requested copies, unless they are highly sensitive in nature.

(d) We will not provide you with copies of the prosecution memoranda in each of the Abscam cases, but will provide you with any basic factual information that appears in those memoranda, including any negative information concerning the Abscam cases.

(e) The Department of Justice may in the first instance deny you access to specific nonpublic materials when, in the opinion of the Department, such access would compromise an ongoing investigation or reveal sensitive sources or techniques; but, if access is so denied in the first instance, the Department will generally describe to you each document thus withheld, state the basis for the denial of access, and give you an opportunity to discuss further conditions under which access to the document or to a portion thereof might be provided.

(3) We agree to provide you with all Department of Justice guidelines regarding undercover activities, together with all documents related to the adoption, drafting, amendment, and approval of those guidelines. This category includes only documents relating directly to such guidelines; it does not include documents relating to specific undercover operations or to the conduct of undercover operations generally. A few sensitive deliberative memoranda containing legal analysis relating to undercover guidelines may in the first instance be withheld; provided, however, that the Department will generally describe the documents withheld, state the reason for the withholding, and give you an opportunity to discuss further conditions under which you might have access to the documents.

(4) We agree to provide you the material requested from the Department's Office of Professional Responsibility, except that the documents considered by the Department to be uniquely privileged -- attorney work product and sensitive deliberative memoranda - may in the first instance be withheld; provided, however, that the Department will generally describe each such document withheld, state the reason for its being withheld, and give you an opportunity to discuss further conditions under which you might have access to the document.

I want to emphasize that we remain open to further discussion regarding the production of additional materials of the type referred to above or other materials. We have fashioned our response to your current requests in order to provide a basis on which to afford you immediate access to the materials that we believe will be most useful in your inquiry, without creating unnecessary ambiguity as to the scope of our undertaking and without prejudicing our concerns for protecting those relatively few documents that we regard as uniquely privileged and sensitive.

If these terms are acceptable to you, we are prepared to begin providing you with access to these materials immediately.

Sincerely,

Rudolph W. Giuliani

Rudolph W. Giuliani
Associate Attorney General

Agreed to: ________________ Date: __________

CHARLES MC C. MATHIAS, JR., MD., CHAIRMAN
WALTER D. HUDDLESTON, KY., VICE CHAIRMAN
JAMES A. MC CLURE, IDAHO
ALAN K. SIMPSON, WYO.
WARREN B. RUDMAN, N.H.
DANIEL K. INOUYE, HAWAII
DENNIS DE CONCINI, ARIZ.
PATRICK J. LEAHY, VT.

United States Senate
SELECT COMMITTEE TO STUDY LAW ENFORCEMENT
UNDERCOVER ACTIVITIES OF COMPONENTS OF THE
DEPARTMENT OF JUSTICE
(PURSUANT TO S. RES. 350, 97TH CONGRESS)
WASHINGTON, D.C. 20510

June 17, 1982

Rudolph W. Guiliani, Esq.
Associate Attorney General
U. S. Department of Justice
Washington, D. C. 20530

Dear Mr. Guiliani:

Chairman Mathias has authorized us to accept the terms of your letter of June 17, 1982, with the following observation and caveat.

First, with respect to the observation, we have requested access to far more material than the four categories listed in the first paragraph of your letter. Please see the letter from Malcolm Wheeler to you dated June 14, 1982. We merely make this observation a matter of record and take note of your willingness to discuss the production of additional material.

With respect to the caveat, and we assume that this expresses the sense of your letter, our agreement to the terms of your letter of June 17, 1982, is expressly conditioned as to all possible documents on the reservation by the Select Committee and its two counsel of the right to seek to convince the Department of Justice to waive the pledge of confidentiality as to any document and to exercise any right it has or, in the absence of this letter, would have had, to compel the unrestricted production or disclosure of any document by the Department of Justice to the Select Committee. In other words, notwithstanding our acceptance of the terms of your letter of June 17, 1982, we reserve every right we have or, in the absence of this letter, would have had, to compel the unrestricted production or disclosure of any document in the possession of the Department of Justice and any of its components to the Select Committee.

Sincerely,

James F. Neal
James F. Neal

Malcolm E. Wheeler
Malcolm E. Wheeler

CHARLES McC. MATHIAS, JR., MD., CHAIRMAN
WALTER D. HUDDLESTON, KY., VICE CHAIRMAN

JAMES A. McCLURE, IDAHO
ALAN K. SIMPSON, WYO.
WARREN B. RUDMAN, N.H.

DANIEL K. INOUYE, HAWAII
DENNIS DeCONCINI, ARIZ.
PATRICK J. LEAHY, VT.

United States Senate
SELECT COMMITTEE TO STUDY LAW ENFORCEMENT
UNDERCOVER ACTIVITIES OF COMPONENTS OF THE
DEPARTMENT OF JUSTICE
(PURSUANT TO S. RES. 350, 97TH CONGRESS)
WASHINGTON, D.C. 20510

July 12, 1982

The Honorable William French Smith
Attorney General of the United States
Department of Justice
Washington, D. C.

Dear Mr. Attorney General:

Counsel to the Senate Select Committee to Study Domestic Undercover Operations of Components of the Department of Justice (the "Committee") have repeatedly requested a copy of the so-called Luskin Report, a report of a study conducted by the Department of Justice at the request and under the direction of former Assistant Attorney General Philip Heymann. To date, the Department has refused to make this report available, even though Mr. Heymann has referred to the Report and has listed various recommendations contained in the Report in testimony before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary of the House of Representatives.

It is the view of the Committee that a study by the Department of Justice of undercover operations with recommendations for improvements patently would be of importance to the Committee, to the Congress and, indeed, to the Department. We, therefore, request that a copy of this report be promptly furnished to counsel.

Counsel to the Committee have also requested the presence of Department attorneys Larry Scharf and John Jacobs to testify as to factual matters within their knowledge involving the undercover operation known as Abscam. To date, the Department has declined to make these attorneys available, asserting that they might be asked policy questions, although they are not policy makers, and that former Department attorney Thomas Puccio will testify and will be able to provide the same information possessed by these attorneys.

In response, we point out that we do not plan to ask these attorneys questions relating to policy. Further, we believe they have information not possessed by Mr. Puccio. Indeed, we are advised the latter was not "in the office" during the month of August 1979, a month of significant activity involving Abscam. Moreover, these are the attorneys who monitored the video sessions conducted during this operation.

We respectfully request that you make attorneys Scharf and Jacobs available to counsel and to the Committee as witnesses. In view of our time restraints, we request a response to our request by Wednesday, July 14, 1982, in order that we may issue subpoenae should your response be negative.

Sincerely,

Charles McC. Mathias, Jr.
Chairman

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 15, 1982

James F. Neal, Esquire
Chief Counsel
Select Committee to Study
Law Enforcement Undercover
Activities of Components of
the Department of Justice
United States Senate
Washington, D.C. 20510

Dear ~~Mr. Neal~~ Jim:

This is in response to Mr. Wheeler's letter of June 30, 1982 to C. Marshall Cain, Deputy Assistant Attorney General, Office of Legislative Affairs, and Chairman Mathias' letter of July 12, 1982 to the Attorney General. This letter also responds to several recent requests for production of various witnesses and materials.

The Department will produce Strike Force attorney Lawrence Scharf for testimony before the Committee. The Committee is free to seek the testimony of former Strike Force attorney John Jacobs. As you know, the Department does not normally permit Strike Force attorneys to testify before congressional committees. For reasons you appreciate, we have traditionally resisted questioning of this kind because it tends to inhibit prosecutors from proceeding through their normal tasks free from the fear that they may be second-guessed, with the benefit of hindsight, long after they take actions and make difficult judgements in the course of their duties. Nevertheless, in the particular circumstances of this case, we will produce Mr. Scharf and interpose no objection to your seeking testimony from Mr. Jacobs. We are doing so because of their value to you as fact witnesses and because you have assured us that they will be asked to testify solely as to matters of fact within their personal knowledge and not conclusions or matters of policy.

In addition, we will make available to you certain other material you have requested as follows, in accordance with the confidentiality agreements reached in our earlier correspondence.

(1) The Department will permit you and Mr. Wheeler to review at FBI Headquarters those portions of the FBI's files relating to Melvin Weinberg's participation in the ABSCAM investigation.

(2) From the files of the FBI's Office of Professional Responsibility, we will make available to you the entire "Blumenthal Report." We will do so as an exception to our normal policies regarding OPR material, which are set forth in Associate Attorney General Giuliani's letter of June 17, 1982, to you.

(3) With respect to your request for copies of documents which reflect internal procedures followed by the FBI, in applying the Attorney General's Guidelines on FBI undercover Operations, we have already provided you with a copy of a memorandum from the Director to the Attorney General, dated July 20, 1981. We will also provide you with copies of "SAC Memoranda" and other communications to FBI field offices directing amendment of the FBI Manual Manual of Investigative Operations and Guidelines to implement those guidelines.

Your request for a copy of the so-called Luskin report remains under advisement, although I anticipate our having a response for you before the week is out.

I understand that your requests concerning memoranda dated January 23, 1981, May 8, 1980, January 4, 1980, and November 28, 1980 has been satisfied through your discussions with Mr. Bryson of the Criminal Division.

As requested, Assistant Director Oliver B. Revell of the FBI is available to testify before the Select Committee on the subject of Attorney General's Guidelines on FBI Undercover Operations on July 20, 1982. Francis M. Mullen, Jr. is available to testify on July 21, 1982. FBI Supervisors Michael D. Wilson and John Good will be made available to testify July 22, 1982 with Mr. Revell continuing to be available for policy issues that may arise during the course of their testimony.

I trust that the foregoing is helpful to you.

Very truly yours,

Bob

Robert A. McConnell
Assistant Attorney General

CHARLES MC C. MATHIAS, JR., MD., CHAIRMAN
WALTER D. HUDDLESTON, KY., VICE CHAIRMAN

JAMES A. MC CLURE, IDAHO
ALAN K. SIMPSON, WYO.
WARREN B. RUDMAN, N.H.

DANIEL K. INOUYE, HAWAII
DENNIS DE CONCINI, ARIZ.
PATRICK J. LEAHY, VT.

United States Senate

SELECT COMMITTEE TO STUDY LAW ENFORCEMENT
UNDERCOVER ACTIVITIES OF COMPONENTS OF THE
DEPARTMENT OF JUSTICE

(PURSUANT TO S. RES. 350, 97TH CONGRESS)

WASHINGTON, D.C. 20510

August 5, 1982

Robert A. McConnell, Esq.
Assistant Attorney General
Office of Legislative Affairs
U. S. Department of Justice
Washington, D. C. 20530

Dear Mr. McConnell:

As Chairman of the Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice, I request that the Department of Justice provide to counsel for the Select Committee the following documents to assist the Select Committee in fulfilling its mandate under Senate Resolution 350:

1. All FBI files, including tapes and transcripts, compiled in the course of the undercover operation known as PALMSCAM.

2. All FBI files, including tapes and transcripts, compiled in the course of the undercover operation known as GOLDCON.

3. All FBI files, including tapes and transcripts, compiled by the Washington Field Office and the Miami Field Office of the FBI in the covert or overt stage of the undercover operation known as ABSCAM.

4. All FBI ABSCAM files, including tapes and transcripts, compiled by FBI Headquarters in the covert or overt stage of the operation and not included in Exhibits 63 and 65 of the Myers due process hearings or otherwise previously provided to the Select Committee.

5. All FBI ABSCAM files, including tapes and transcripts, compiled by the Brooklyn-Queens Field Office of the FBI in the covert or overt phase stage of the operation and not included in Exhibits 63 and 65 of the Myers due process hearings or otherwise previously provided to the Select Committee.

6. A current catalog of all ABSCAM audio and video tapes.

7. A current catalog of all ABSCAM audio and video tape transcripts.

8. All documents in FBI or other Department of Justice files from Operation PALMSCAM, Operation GOLDCON or Operation ABSCAM or in any other source showing when certificates of deposit or letters of credit were received by Melvin Weinberg or any undercover agent from William Rosenberg in 1978 or 1979 or showing what was done with those securities or where they are now located.

9. A memorandum prepared by FBI Agent Houlihan in approximately August 1981, approximately 100 pages long, describing various ABSCAM events.

10. All FD 302 summaries of interviews of Edward Ellis.

11. Documents 115, 274 and 275 from the FBI Headquarters ABSCAM files.

12. All documents, including tapes and transcripts, establishing or suggesting that on or about October 20, 1979, Mayor Angelo Errichetti told an FBI informant or undercover agent that Kenneth MacDonald never received any part of the $100,000 payment made by FBI Agent McCarthy to Mayor Errichetti on March 31, 1979.

13. Each request document and approval document for any lump sum payment made to Melvin Weinberg between January 1, 1977, and the present.

14. Any memorandum prepared by Larry Sharf or any other attorney in the Office of the Strike Force for the Eastern District of New York discussing the advisability or possibility of obtaining Title III wiretaps on any ABSCAM informant, defendant or target.

15. Any written statement prepared for the signature of, whether or not actually signed by, Howard Criden regarding any aspect of his involvement in ABSCAM.

16. Unredacted copies of the following documents:

09/05/79	Airtel from BQ to Director; Subject: Undercover Activities - Criminal Matters.
09/04/79	Airtel from BQ to Director.
08/21/79	Teletype from BQ to Director. [Begins "Undercover Special Agents (UCAS) of . . . ."]
08/08/79	Airtel from BQ to Director.
07/05/79	Airtel from BQ to Director; Subject: Undercover Activities - Criminal Matters.
08/13/79	Airtel from BQ to Director; Subject: Undercover Activities - Criminal Matters.
06/20/79	Airtel from BQ to Director.
03/08/79	Airtel from BQ to Director; Subject: Undercover Activities - Criminal Matters.
02/14/79	Airtel from BQ to Director.
01/17/79	Airtel from Newark to BQ, "re B/Q airtel to Newark, dated 12/20/79 . . ."
12/20/78	Airtel from BQ to Newark; Subject: Rosenberg; Eden, Errichetti; Hobbs Act.
04/27/79	Teletype from BQ to Director. [Begins "Reference Bureau teletype to New York, April 27, 1979 . . . ."]
02/01/80	Teletype from Philadelphia to Director, BQ, Newark. [Begins "Philadelphia undercover apparatus . . . ."]
01/25/80	[Date-stamped on bottom.] Teletype from Philadelphia to Director, BQ, Newark

01/23/80	Teletype from BQ to Director. [Begins "Set forth below is a contemplated . . . ."]
01/16/80	Teletype from BQ to Director. [Begins "REBQTEL to Bureau, January 14, 1980, ..."]
01/03/80	Teletype from BQ to Director. [Begins "REBQTEL, December 26, 1979, to Bureau . . . ."]
10/17/79	Teletype from BQ to Director.
09/17/79	Airtel from BQ to Director.
09/01/79 or 09/10/79	Teletype from Newark to Director. [Begins "On August 30, 1979, a conference . . . ."]
01/16/81	302 by SA McCarthy, transcribed 1/27/81.
06/24/80	302 by SAs Connelly & Houlihan, transcribed 6/30/80.

17. Transcripts of the following tapes (or, where transcripts have not been made, the tapes themselves):

09/15/78	Weinberg, McCarthy, Bell, Linnick, Morris, Eacrat, Fuller
10/25/78	Weinberg, Weiss
10/28/78	Weinberg, Rosenberg
10/29/78	Weinberg, Weiss
11/01/78	Weinberg, Meltzer
11/17/78	McCarthy, Weiss
11/17/78	McCarthy, Rosenberg
11/17/78	McCarthy, Wynn, Weiss
01/09/79	McCloud, Errichetti, N.J. State Senator
02/07/79	Amoroso, Errichetti, Weinberg (Holiday Inn, Atlantic City, NJ)
02/12/79	Errichetti (Holbrook, NY)

02/13/79	UCSAs and Errichetti (Holbrook, NY)
03/01/79	Weinberg, Rosenberg
06/28/79	2 transcripts from Key Bridge Marriot, Rosslyn, Virginia
07/11/79	transcript from International Hotel, Queens, New York
08/22/79	transcript from International Hotel, Queens, New York
08/22/79	UCSAs and Myers (Travelodge, JFK Airport)
09/11/79	Lederer, Errichetti
09/11/79	?
09/11/79	Rosenberg, Weiss

Because Senate Resolution 350 charges this Committee with the responsibility of studying not only FBI undercover operations, but undercover operations conducted by all components of the Department of Justice, I also request that the Department of Justice provide to counsel for the Select Committee the following documents:

1. All guidelines, policy statements, memoranda to agents and other documents describing internal requirements for the initiation, implementation, management, supervision, control or termination of undercover operations conducted by the Alcohol, Firearms & Tobacco Division of the Department of Justice, Drug Enforcement Administration, and any other component of the Department of Justice that conducts undercover operations.

2. A copy of the full case file for a paradigmatic undercover operation commenced by the Drug Enforcement Administration after January 1, 1979.

3. A copy of the full case file for a paradigmatic undercover operation commenced by the Alcohol, Firearms & Tobacco Division after January 1, 1979.

4. A copy of the full case file for a paradigmatic undercover operation commenced by every other component of the Department of Justice that conducts undercover operations.

Because of the brief amount of time remaining before the Select Committee's report to the Senate must be written, and because we would like to turn our attention to undercover operations other than ABSCAM as soon as possible, we will greatly appreciate your providing us with the ABSCAM documents described above at the earliest possible moment--preferably, during the week of August 9, 1982. Further, should there be any reluctance on the part of the Department of Justice to comply with any of the requests described above, I would appreciate being informed of that fact during the week of August 9, 1982.

Thank you for your prompt attention to this matter.

Yours truly,

Charles McC. Mathias, Jr.
Chairman

U.S. Department Justice

Washington, D.C. 20530

August 6, 1982

Malcolm E. Wheeler, Esq.
Room 309
Russell Senate Office Building
Washington, D.C. 20530

Dear Mr. Wheeler:

This is to confirm the terms of the agreement we have reached orally regarding the Select Committee's access to the Department of Justice document known as the "Luskin Report."

On behalf of the Department of Justice, I have agreed that you, Mr. Neal, and all Members of the Committee may have access to the Luskin Report, which will be provided to you at the Department of Justice at any time that is convenient to you. I have further agreed that you should feel free to take notes or bring other materials with you to use in conjunction with your study of the Report. However, we ask that you not make a copy of the Report or take the Report out of the Department of Justice Building.

The Report is a confidential Department of Justice document, and it is understood that, except as otherwise provided in this letter, its use will be governed by the terms of Mr. Giuliani's letter to you of June 17, 1982, relating to the use of confidential Department of Justice materials.

We agree, of course, that by accepting this offer, the Committee is in no way waiving any right that it would otherwise have to obtain access to the Report. We have also agreed that by providing this form of access to the Report, the Department is not waiving any rights it would otherwise have had to resist production of the Report. In particular, it is understood that by providing access to the Report under this agreement, the Department will not be deemed to have waived any privilege or right relating to the confidentiality of the document.

If you are satisfied that the foregoing is an accurate recitation of the terms of our oral agreement, please let me know when you would like to view the Report. We will ensure that the Report is made available to you at any time that you choose.

Sincerely,

William C. Bryson

William C. Bryson

U.S. Department of Justice

Washington, D.C. 20530

August 18, 1982

Honorable Charles McC. Mathias, Jr.
Chairman
Select Committee to Study Law Enforcement
Undercover Activities of Components of
the Department of Justice
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

This letter is in response to your request for production of additional Department of Justice materials in connection with your Committee's work. On Friday, August 13, 1982, we communicated to Messrs. Neal and Wheeler, co-counsel for the Committee, our willingness to produce a substantial amount of the material that you have requested, for immediate review. As we explain in some detail below, we will agree to produce the bulk of the materials you have requested; as to those materials that we do not feel that we can produce at the present time, we believe an acceptable accommodation can be reached through further discussions with you or with members of your staff.

The materials we have agreed to provide to you will be produced subject to the terms set forth in the June 17, 1982, letter from Associate Attorney General Giuliani to Messrs. Neal and Wheeler, a copy of which is attached. In particular, our production of these materials will be contingent upon the applicability of the same confidentiality agreement that was set forth in the June 17 letter, and we will reserve the right to withhold production of materials that relate to an ongoing investigation or reveal sensitive sources or techniques.

The following is our response with respect to each of the categories of materials you have requested:

1. The FBI PALMSCAM files, which you have requested in category (1) of your letter, relate to an undercover operation that has resulted in a number of pending civil suits against the government. Because of the pendency of that litigation, we must decline to produce these files at this time. However, we will

produce for your inspection the materials from this file that relate to the receipt of certificates of deposit or letters of credit in 1978 or 1979, as you have requested in category (8) of your letter.

2. The GOLDCON files, which you have requested in category (2), are voluminous, and we anticipate that our preliminary review of those files to remove materials relating to ongoing investigations and sensitive sources or techniques would be quite time-consuming. We propose that instead of producing the entire set of GOLDCON files, the FBI will produce those portions of the GOLDCON files that relate to Melvin Weinberg or to the receipt of certificates of deposit or letters of credit in 1978 or 1979, as you have requested in category (8).

3. The materials you have requested in categories (3) through (10) and in categories (13), (15), and (16) will be made available to you under the terms set forth in the June 17 letter.

4. With respect to category (11), you have already been provided copies of Documents 274 and 275 from the FBI Headquarters ABSCAM files. As to Document 115, we must decline to provide you a copy of that document in light of the extreme sensitivity of its contents.

5. To the extent that we have been able to identify the materials that are relevant to your inquiry, the materials you have requested in category (12) will be made available to you under the terms set forth in the June 17 letter.

6. With respect to category (14), we have not been able to locate any such document in the Department of Justice files in Washington, and Larry Sharf of the Brooklyn Strike Force advises us that he did not prepare such a document and that he is not aware of any such document prepared by any other member of that office. Of course, if we should locate any document fitting the description you have given in category (14), we will promptly advise you.

7. With respect to category (17), we will make available all the materials you have requested except for the tape and transcript of the November 1, 1978, conversation between Weinberg and Meltzer, which is being withheld because of the pending civil actions mentioned above in paragraph 1.

8. On page five of your letter, you request materials relating to undercover operations run by other components of the Department of Justice. As you know, the Bureau of Alcohol, Tobacco & Firearms is a component of the Treasury Department, not the Department of Justice. Accordingly, if you are interested in

materials relating to ATF undercover operations, you should contact the appropriate persons in that Department.

You have also requested a copy of the full case file for a typical undercover operation commenced by the Drug Enforcement Administration after January 1, 1979, and the case file of a similar undercover operation commenced by every other component of the Department of Justice that conducts undercover operations. We agree to provide you with the case file of a typical DEA undercover operation. As to files relating to undercover operations of other components of the Department of Justice, we believe that we can satisfy your needs on this score after informal discussion with Committee counsel regarding the extent and nature of undercover activities by various units within the Department.

Finally, you have requested certain materials relating to the undercover guidelines for components of the Department of Justice that conduct undercover operations, other than the FBI. We agree to provide you with guidelines regarding the undercover activities of these components on the same basis and to the same extent that we have done in the case of the FBI; that is, we will provide materials for other components in the Department of Justice in accordance with the provisions of paragraph (3) of the June 17 letter from Mr. Giuliani to Messrs. Neal and Wheeler. Once again, we believe that we can best resolve through informal discussions with Committee counsel the question of which components of the Department of Justice should be covered by this undertaking.

If these provisions are satisfactory to you, we are prepared to begin immediately in providing you with access to the materials referred to above.

Sincerely,

Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

CHARLES McC. MATHIAS, JR., MD., CHAIRMAN
WALTER D. HUDDLESTON, KY., VICE CHAIRMAN
JAMES A. MC CLURE, IDAHO
ALAN K. SIMPSON, WYO.
WARREN B. RUDMAN, N.H.
DANIEL K. INOUYE, HAWAII
DENNIS DE CONCINI, ARIZ.
PATRICK J. LEAHY, VT.

United States Senate
SELECT COMMITTEE TO STUDY LAW ENFORCEMENT
UNDERCOVER ACTIVITIES OF COMPONENTS OF THE
DEPARTMENT OF JUSTICE
(Pursuant to S. Res. 350, 97th Congress)
WASHINGTON, D.C. 20510

August 19, 1982

The Honorable William French Smith
Attorney General of the United States
Department of Justice
Washington, D. C. 20530

Dear Mr. Attorney General:

During this Committee's investigation of law enforcement undercover activities of components of the Department of Justice, a document known as the Luskin Report has come to the attention of Committee members and counsel. The Luskin Report has been described to the Committee as a comprehensive evaluation of procedures used in FBI undercover operations.

Pursuant to our present agreement with the Department of Justice, counsel for the Committee have been able to review and take notes from this document. Irvin B. Nathan, Former Deputy Assistant Attorney General, drew upon its contents in his recent testimony before the Committee, as did Professor Philip B. Heymann, former Assistant Attorney General, when he testified before the House Subcommittee on Civil and Constitutional Rights.

The Luskin Report would be of considerable value to the completion of the Committee's investigation and preparation of recommendations to the Senate. Despite our counsel's repeated requests, both informal and on the record during Committee hearings on July 29, 1982, despite the public description of portions of the document's contents by former Department of Justice officials, and despite the fact that the Committee's counsel have been permitted to read and take extensive notes on the document, the Department of Justice has continued to refuse to provide this Committee a copy of the Report. We find that refusal to be unreasonable in view of the fact that the sole effect is to make it impractical for members of the Committee to study carefully and in detail the contents of the documents.

Accordingly, the Committee hereby requests prompt release of a copy of the Luskin Report to the Committee by the Department of Justice.

Thank you for your consideration of this matter.

Very truly yours,

Charles McC. Mathias, Jr.
Chairman

CHARLES MC C. MATHIAS, JR., MD., CHAIRMAN
WALTER D. HUDDLESTON, KY., VICE CHAIRMAN
JAMES A. MC CLURE, IDAHO
ALAN K. SIMPSON, WYO.
WARREN B. RUDMAN, N.H.
DANIEL K. INOUYE, HAWAII
DENNIS DE CONCINI, ARIZ.
PATRICK J. LEAHY, VT.

United States Senate
SELECT COMMITTEE TO STUDY LAW ENFORCEMENT
UNDERCOVER ACTIVITIES OF COMPONENTS OF THE
DEPARTMENT OF JUSTICE
(Pursuant to S. Res. 350, 97th Congress)
WASHINGTON, D.C. 20510

August 19, 1982

The Honorable William H. Webster
Director, Federal Bureau of Investigation
J. Edgar Hoover Building
Ninth and Pennsylvania Streets, N. W.
Washington, D. C. 20535

Dear Director Webster:

As I stated to you in my letter of August 18, 1982, the Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice has now completed six full days of public hearings on the various sets of guidelines that currently cover FBI undercover operations and on the undercover operation known as Abscam. In addition, counsel to the Committee have reviewed numerous Abscam files made available to them by the FBI and by other components of the Department of Justice. Counsel to the Committee have also interviewed some former officials of the Department of Justice who participated in the Abscam operation. Counsel have also reviewed the testimony of many witnesses in the Abscam trials and due process hearings.

Despite these substantial efforts, there remain several factual questions pertaining to Abscam as to which the Committee and its counsel believe themselves to be insufficiently informed. It further appears that the necessary information can be reasonably expected to be obtained only through discussions with specific FBI agents: Agents John McCarthy, Anthony Amoroso, Gunnar Askeland and Myron Fuller.

Accordingly, the Committee hereby requests that you make those four agents available to counsel to the Committee, Messrs. Neal and Wheeler, for interviews on factual matters pertaining to Abscam. In making this request, we have taken into account the concern you have expressed in the past regarding the problems that might arise if agents were regularly to be called upon to testify or otherwise describe their investigative activities. Here, however, the following additional factors exist: (1) the agents have previously testified, in varying degrees of detail, about some of their Abscam activities, with some agents having testified more than once; (2) the agents' names and general involvement in Abscam are matters of public knowledge; and (3) this Committee has, with your helpful cooperation, studied an FBI undercover operation in greater depth than has, to our knowledge, ever before been accomplished by a congressional committee, and now has identified specific areas of factual inquiry as to which these agents, and only these agents, can provide the necessary information. We have therefore concluded that it would be unwise and contrary to our obligation under Senate Resolution 350 for us not to take the remaining steps needed to exhaust all sources of information that can reasonably be expected to enable us to understand precisely how this important undercover operation was initiated, managed, controlled, directed and supervised.

I will appreciate a prompt reply, so that the Committee can complete its study of Abscam and turn its full attention to the other operations we have selected for in-depth study.

Very truly yours,

C Mc. Mat

Charles McC. Mathias, Jr.
Chairman

U.S. Department of Justice

Washington, D.C. 20530

August 27, 1982

Honorable Charles McC. Mathias, Jr.
Chairman
Select Committee to Study Law Enforcement
Undercover Activities of Components of
the Department of Justice
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

This letter is in response to your letter of August 19, 1982, requesting the release of a copy of the so-called Luskin Report to the Committee by the Department of Justice.

Because the Luskin report is simply a staff draft of a study done by several individuals in the Department and does not represent an official position of the Department of Justice, we have declined to produce the report publicly. However, recognizing the interest of your Committee in reviewing this document, we have sought and will continue to seek to accommodate your needs short of public release of the report.

As you know, we have provided access to the Luskin report to the Committee members and to Committee counsel. The two counsel to the Committee have reviewed the report at the Department of Justice and have taken notes on its contents. In your letter, you explain that this procedure has not been fully satisfactory because it has made it impractical for the members of the Committee to review the report personally.

In order to overcome this problem, we are willing to provide a copy of the Luskin report to each member of the Committee for his personal review. However, because we regard the report as an internal document, we must request that the report not be disseminated beyond the members of the Committee and its two counsel. In addition, we must request that the contents of the report not be revealed publicly, in whole or in part, that no additional copies be made, and that all copies of the report that are provided to the members of the Committee be returned to the Department at the conclusion of the Committee's work.

I hope that this arrangement is satisfactory and that it will serve to overcome the difficulties encountered under the previous arrangement.

Sincerely,

Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

CHARLES McC. MATHIAS, JR., MD., CHAIRMAN
WALTER D. HUDDLESTON, KY., VICE CHAIRMAN
JAMES A. McCLURE, IDAHO
ALAN K. SIMPSON, WYO.
WARREN B. RUDMAN, N.H.
DANIEL K. INOUYE, HAWAII
DENNIS DE CONCINI, ARIZ.
PATRICK J. LEAHY, VT.

United States Senate
SELECT COMMITTEE TO STUDY LAW ENFORCEMENT
UNDERCOVER ACTIVITIES OF COMPONENTS OF THE
DEPARTMENT OF JUSTICE
(PURSUANT TO S. RES. 350, 97TH CONGRESS)
WASHINGTON, D.C. 20510

September 7, 1982

The Honorable William H. Webster
Director, Federal Bureau of Investigation
Ninth Street & Pennsylvania Avenue, N. W.
Washington, D. C. 20535

Dear Director Webster:

Pursuant to your letter of August 24, 1982, counsel to the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice have now completed their briefing with respect to Special Agents Fuller, McCarthy and Askeland, and have scheduled a briefing with respect to Special Agent Amoroso. The Committee appreciates your cooperation in that regard and requests a similar briefing with respect to Special Agent Martin Houlihan on September 13, 1982, at 10:00 a.m.

In addition, although the documents already provided to the Committee with respect to Operations Buy-In, Frontload, Labou and Lobster have been helpful, additional documentation is needed to enable the Committee to compare those operations with each other and with Abscam. Accordingly, the Committee requests that you provide counsel to the Committee with access to all FBI Headquarters and field office files for Lobster and Buy-In and to the first FBI Headquarters file and the first three field office files for Labou.

Sincerely,

Charles McC. Mathias, Jr.
Chairman

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

September 15, 1982

Honorable Charles McC. Mathias, Jr.
Chairman
Select Committee to Study Law Enforcement
  Undercover Activities of Components
  of the Department of Justice
United States Senate
Washington, D. C. 20510

Dear Chairman Mathias:

This letter is in response to your letter to me dated September 7, 1982, in which you requested I make one additional Special Agent available for interview by the Committee and additional documentation be made available for review by counsel for the Committee.

In regard to your request to interview Special Agent Martin F. Houlihan, I am making available a Federal Bureau of Investigation (FBI) Headquarters official to provide your counsel with a briefing, at FBI Headquarters. Special Agent Houlihan will be present and, to the extent necessary, will assist in this briefing. It would be helpful if your counsel could provide, in advance of the briefing, a description of the information they seek. In this regard, they should continue to deal with Special Agent Thomas M. Martens.

With regard to the files requested, the FBI will provide access to them consistent with the procedures developed with regard to the Abscam files. It is my understanding that your counsel has already begun the review requested.

Sincerely yours,

William H Webster

William H. Webster
Director

1 - Robert A. McConnell - Enclosures (3)
    Assistant Attorney General
    Office of Legislative Affairs

APPENDIX D

GUIDELINES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE

Office of the Attorney General
Washington, D.C. 20530

THE ATTORNEY GENERAL'S GUIDELINES ON CRIMINAL INVESTIGATIONS OF INDIVIDUALS AND ORGANIZATIONS

As the primary criminal investigative agency in the federal government, the FBI has the authority and responsibility to investigate all criminal violations of federal law not exclusively assigned to another federal agency. The FBI thus plays a central role in national law enforcement and in the proper administration of justice in the United States.

These Guidelines attempt to strike the difficult balance between the recognized need for broad investigative authority in the FBI, and the equally important need for protection of individual rights. It is hoped that the Guidelines will encourage agents of the FBI to perform their duties with greater certainty, confidence and effectiveness. These Guidelines should also give the public a firm assurance that the FBI is acting properly under the law.

In large measure these Guidelines reaffirm current investigative practices of the FBI. A key principle underlying these practices, and reflected in these Guidelines, is that individuals and organizations should be free from law enforcement scrutiny that is undertaken without a valid factual predicate and without a valid law enforcement purpose. Such investigative activity poses the risk of undue injury to reputation and increases the chance that an investigative target may be prosecuted for improper reasons. Accordingly, these Guidelines recognize that FBI investigations should be focused on the detection, prevention and prosecution of crimes. In addition, they reaffirm the requirement that inquiries and investigations should be based on a reasonable factual predicate, and subject to objective review in the FBI and the Justice Department.

These Guidelines, which include the Attorney General's previously promulgated Guidelines on Domestic Security Investigations, provide guidance for all investigations by the FBI of crimes and crime-related activities. The standards and requirements set forth herein govern the circumstances under which an investigation may be begun, and the permissible scope, duration, subject-matters, and objectives of an investigation.

All investigations of crime or crime-related activities shall be undertaken in accordance with one or more of these Guidelines. The first set of Guidelines governs investigations undertaken to detect, prevent and prosecute specific violations of federal law. The second set of Guidelines governs criminal intelligence investigations undertaken to obtain information concerning enterprises which are engaged in racketeering activities involving violence, extortion or public corruption. The third set of Guidelines governs criminal intelligence investigations undertaken for the purpose of obtaining information on activities that threaten the national security, as defined herein.

These Guidelines are issued under the authority of the Attorney General as provided in 28 U.S.C. 509, 510, and 533. They are consistent with the requirements of the proposed FBI Charter Act but do not depend upon passage of the Act for their effectiveness.

CONTENTS

I. General Crimes Investigations

    A. General Principles
    B. Definitions
    C. Investigations
    D. Inquiries

II. Racketeering Enterprise Investigations

    A. Definitions
    B. General Authority
    C. Purpose
    D. Scope
    E. Authorization and Renewal

III. Domestic Security Investigations

IV. Reservation

I. General Crimes Investigations

A. General Principles

A primary mission of the Federal Bureau of Investigation is to investigate specific violations of the federal criminal laws for purposes of detection, prevention, and prosecution of crime. These investigations are called "general crimes" investigations under these Guidelines, to distinguish them from criminal intelligence investigations of racketeering enterprises and of domestic security matters.

Three sorts of principles must be observed in investigating general crimes. The first address when an investigation can properly be opened. The second address how an investigation should be conducted. The third address when an investigation should be terminated.

First, investigations should be conducted only for the purpose of detecting, preventing, or prosecuting violations of federal criminal law. No investigation may be based solely on the lawful expression of religious or political views by an individual or group, the lawful exercise of the right to peaceably assemble and to petition the Government, or the lawful exercise of any other right secured by the Constitution or by the laws of the United States. An investigation may be opened when there are facts or circumstances that "reasonably indicate" a federal criminal violation has occurred, is occurring, or will occur. This standard of "reasonable indication" is substantially lower than probable cause, but does require specific facts or circumstances indicating a violation.

Second, an investigation is to be conducted with minimal intrusion consistent with the need to collect information or evidence in a timely and effective manner. The seriousness of the alleged criminal activity and the quality of the information indicating the existence of the activity should be among the factors considered in determining the investigation's proper scope and intrusiveness.

Third, an investigation should be promptly terminated upon completion of all reasonable and logical investigative steps, and if appropriate, should be presented for prosecutive opinion.

Where the factual basis for an investigation does not yet exist, but some response appears to be warranted to an allegation or other information concerning possible illegal conduct, these Guidelines also permit the limited step of conducting a preliminary "inquiry". Inquiries as a general rule should be less intrusive and of shorter duration than full investigations.

In circumstances where neither an investigation nor an inquiry is warranted, the FBI may ascertain the general scope and nature of criminal activity in a particular location or sector of the economy.

B. Definitions

(1) "Exigent circumstances" are circumstances requiring action before authorization otherwise necessary under these guidelines can reasonably be obtained, in order to protect life or substantial property interests; to apprehend or identify a fleeing offender; to prevent the hiding, destruction or alteration of evidence; or to avoid other serious impairment or hindrance of an investigation.

(2) "Sensitive criminal matter" is any alleged criminal conduct involving corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a religious organization or a primarily political organization or the related activities of any individual prominent in such an organization, or the activities of the news media; and any other matter which in the judgment of a Special Agent in Charge (SAC) should be brought to the attention of the United States Attorney or other appropriate official in the Department of Justice, as well as FBI Headquarters (FBIHQ).

C. Investigations

(1) A general crimes investigation may be initiated by the FBI when facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed. The investigation may be conducted to prevent, solve, and prosecute such criminal activity.

The standard of "reasonable indication" is lower than probable cause. In determining whether there is reasonable indication of a federal criminal violation, a Special Agent may take into account any facts or circumstances that a prudent investigator would consider. However, the standard does require specific facts or circumstances indicating a past, current, or impending violation. There must be an objective, factual basis for initiating the investigation; a mere hunch is insufficient.

(2) Where a criminal act may be committed in the future, preparation for that act can, of course, amount to a current criminal violation under the conspiracy or attempt provisions of federal criminal law, if there are present the requisite agreement and overt act, or substantial step

toward completion of the criminal act and intention to complete the act. With respect to criminal activity that may occur in the future but does not yet involve a current criminal conspiracy or attempt, particular care is necessary to assure that there exist facts and circumstances amounting to a reasonable indication that a crime will occur.

(3) The FBI supervisor authorizing an investigation shall assure that the facts or circumstances meeting the standard of reasonable indication have been recorded in writing.

In sensitive criminal matters, as defined in paragraph B(2), the United States Attorney or an appropriate Department of Justice official and FBIHQ shall be notified in writing of the basis for an investigation as soon as practicable after commencement of the investigation.

(4) In a general crimes investigation, the FBI may use any lawful investigative technique. Before employing a technique, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Some of the factors to be considered in judging intrusiveness are adverse consequences to an individual's privacy interests and avoidable damage to his reputation. Whether a highly intrusive technique should be used depends on the seriousness of the crime and the strength of the information indicating the existence of the crime. It is recognized that choice of technique is a matter of judgment.

(5) All requirements for use of a technique set by statute, Department regulations and policies, and Attorney General guidelines must be complied with. The investigative techniques listed below are subject to the noted restrictions:

(a) Informants and confidential sources must be used in compliance with the Attorney General's Guidelines on the Use of Informants and Confidential Sources;

(b) Undercover operations must be conducted in compliance with the Attorney General's Guidelines on FBI Undercover Operations;

(c) Nonconsensual electronic surveillanee must be conducted pursuant to the warrant procedures and requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520;

(d) Pen registers must be authorized pursuant to Department policy. This requires an order from a federal district court and an extension every 30 days, under the December 18, 1979 memorandum from the Assistant AttorneyGeneral in charge of the Criminal Division to all United States Attorneys;

(e) Consensual electronic monitoring must be authorized pursuant to Department policy. For consensual monitoring of conversations other than telephone conversations, advance authorization must be obtained from the Director or Associate Director of the Office of Enforcement Operations or a Deputy Assistant Attorney General in the Criminal Division, or the Assistant Attorney General in charge of the Criminal Division, except in exigent circumstances. This applies both to devices carried by the cooperating participant and to devices installed on premises under the control of the participant. See USAM 9-7.013. For consensual monitoring of telephone conversations, advance authorization must be obtained from the SAC and the appropriate U.S. Attorney, except in exigent circumstances;

(f) Searches and seizures must be conducted under the authority of a valid warrant unless the search or seizure comes within a judicially recognized exception to the warrant requirement;

(g) Whenever an individual is known to be represented by counsel in a particular matter, the FBI shall follow applicable law and Department procedure concerning contact with represented individuals in the absence of prior notice to their counsel. The SAC or his designee and the United States Attorney shall consult periodically on applicable law and Department procedure.

(6) The Special Agent conducting an investigation shall maintain periodic written or oral contact with the appropriate federal prosecutor, as circumstances require and as requested by the prosecutor.

When, during an investigation, a matter appears to arguably warrant prosecution, the Special Agent shall present the relevant facts to the appropriate federal prosecutor. In every sensitive criminal matter, the FBI shall notify the appropriate federal prosecutor of the termination of an investigation within 30 days of such termination. Information on investigations which have been closed shall be available on request to a United States Attorney or his designee or an appropriate Department of Justice offical.

(7) When a serious matter investigated by the FBI is referred to state or local authorities for prosecution, the FBI, insofar as resources permit, shall promptly advise the federal prosecutor in writing if the state or local authorities decline prosecution or fail to commence prosecutive action within 120 days. Where an FBI field office cannot provide this follow-up, the SAC shall so advise the federal prosecutor.

(8) When credible information is received concerning serious criminal activity not within the FBI's investigative jurisdiction, the FBI field office shall promptly transmit the information or refer the complainant to the law enforcement agencies having jurisdiction, except where disclosure would jeopardize an ongoing investigation, endanger the safety of an individual, disclose the identity of an informant, interfere with an informant's cooperation, or reveal legally privileged information. If full disclosure is not made for the reasons indicated, then whenever feasible, the FBI field office shall make at least limited disclosure to the law enforcement agency having jurisdiction, and full disclosure shall be made as soon as the need for restricting dissemination is no longer present. Where full disclosure is not made to the appropriate law enforcement agencies within 180 days, the FBI field office shall promptly notify FBI Headquarters in writing of the facts and circumstances concerning the criminal activity. The FBI shall make a periodic report to the Deputy Attorney General on such nondisclosure and incomplete disclosures, in a form suitable to protect the identity of informants and confidential sources.

Whenever information is received concerning unauthorized criminal activity by an informant or confidential source, it shall be handled in accord with paragraph G of the Attorney General's Guidelines on Use of Informants and Confidential Sources.

(9) All requirements regarding investigations shall apply to reopened investigations. In sensitive criminal matters, the United States Attorney or the appropriate Department of Justice official shall be notified in writing as soon as practicable after the reopening of an investigation.

D. Inquiries

(1) On some occasions the FBI may receive information or an allegation not warranting a full investigation -- because there is not yet a "reasonable indication" of criminal activity -- but whose responsible handling requires some further scrutiny beyond the prompt and extremely limited checking out of initial leads. In such circumstances, though the factual predicate for an investigation has not been met, the FBI may initiate an "inquiry" involving some measured review, contact, or observation activities in response to the allegation or information indicating the possibility of criminal activity.

This authority to conduct inquiries short of a full investigation allows the government to respond in a measured way to ambiguous or incomplete information and to do so with as little intrusion as the needs of the situation permit. This is especially important in such areas as white-collar crime where no complainant is involved or when an allegation or information is received from a source of unknown reliability. It is contemplated that such inquiries would be of short duration and be confined solely to obtaining the information necessary to make an informed judgment as to whether a full investigation is warranted.

An "inquiry" is not a required step when facts or circumstances reasonably indicating criminal activity are already available; in such cases, a full investigation can be immediately opened.

(2) The FBI supervisor authorizing an inquiry shall assure that the allegation or other information which warranted the inquiry has been recorded in writing. In sensitive criminal matters, the United States Attorney or an appropriate Department of Justice official shall be notified of the basis for an inquiry as soon as practicable after the opening of the inquiry, and the fact of notification shall be recorded in writing.

(3) Inquiries shall be completed within 60 days after initiation of the first investigative step. The date of the first investigative step is not necessarily the same date on which the first incoming information or allegation was received. An extension of time in an inquiry for succeeding 30-day periods may be granted by FBI Headquarters upon receipt of a written request and statement of reasons why further investigative steps are warranted when there is no "reasonable indication" of criminal activity.

(4) Before employing an investigative technique in an inquiry, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Some of the factors to be considered in judging intrusiveness are adverse consequences to an individual's privacy interests and avoidable damage to his reputation. Whether an intrusive technique should be used in an inquiry depends on the seriousness of the possible crime and the strength of the information indicating the possible existence of the crime. However, the techniques used in an inquiry should generally be less intrusive than those employed in a full investigation. It is recognized that choice of technique is a matter of judgment.

(5) The following investigative techniques shall not be used during an inquiry:

(a) Mail covers;

(b) Mail openings;

(c) Nonconsensual electronic surveillance or any other investigative technique covered by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520.

(6) The following investigative techniques may be used in an inquiry without any prior authorization from a supervisory agent:

(a) Examination of FBI indices and files;

(b) Examination of records available to the public and other public sources of information;

(c) Examination of available federal, state and local government records;

(d) Interview of the complainant, previously established informants, and confidential sources;

(e) Interview of the potential subject;

(f) Interview of persons who should readily be able to corroborate or deny the truth of the allegation, except this does not include pretext interviews or interviews of a potential subject's employer or co-workers unless the interviewee was the complainant;

(g) Physical or photographic surveillance of any person.

The use of any other lawful investigative technique in an inquiry shall require prior approval by a supervisory agent, except in exigent circumstances. Where a technique is highly intrusive, a supervisory agent shall approve its use in the inquiry stage only in compelling circumstances and when other investigative means are not likely to be successful.

(7) Where an inquiry fails to disclose sufficient information to justify an investigation, the FBI shall terminate the inquiry and make a record of the closing. In a sensitive criminal matter, the FBI shall notify the United States Attorney of the closing and record the fact of notification in writing. Information on an inquiry which has been closed shall be available on request to a United States Attorney or his designee or an appropriate Department of Justice official.

(8) All requirements regarding inquiries shall apply to reopened inquiries. In sensitive criminal matters, the United States Attorney or the appropriate Department of Justice official shall be notified as soon as practicable after the reopening of an inquiry.

II. Racketeering Enterprise Investigations

The vast majority of FBI investigations will be conducted pursuant to Part I, and will be directed at specific activities or conduct in violation of federal law -- what are termed "general crimes" under these guidelines. In addition to this authority the FBI may also investigate certain criminal organizations or enterprises -- what are termed "racketeering enterprises" -- for the purpose of obtaining information concerning the composition, structure, and activities of the racketeering enterprises. Except in exceptional circumstances specifically authorized by the Director and concurred in by the Attorney General, this authority may be exercised only when the activity engaged in by the racketeering enterprise involves violence, extortion, or systematic public corruption.

A. Definitions

1. A "racketeering enterprise" is two or more persons engaged in a continuing course of conduct for the purpose of obtaining monetary or commercial gains or profits wholly or in part through racketeering activity.

2. Racketeering activity is any offense, including a violation of state law, encompassed by the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961(1).

B. General Authority

1. The FBI has authority to conduct investigations of racketeering enterprises whose activities involve violence, extortion, or systematic public corruption. A racketeering enterprise not engaged in such activities may be investigated under this authority only upon a written determination by the Director, concurred in by the Attorney General, that such investigation is justified by exceptional circumstances.

2. A racketeering enterprise investigation may be initiated only when facts or circumstances reasonably indicate the existence of a racketeering enterprise meeting the criteria set forth in paragraph II B 1. The standard of "reasonable indication" is identical to that governing the initiation of a general crimes investigation under Part I.

3. Authority to conduct racketeering enterprise investigations is separate from and in addition to general crimes investigative authority under Part I. Information warranting initiation of a racketeering enterprise investigation may be obtained during the course of a general crimes inquiry or investigation. Conversely, a racketeering enterprise investigation may yield information warranting a general crimes inquiry or investigation.

C. Purpose

The immediate purpose of a racketeering enterprise investigation is to obtain information concerning the nature and structure of the enterprise, as specifically delineated in paragraph II D below, with a view to the longer range objective of detection, prevention, and prosecution of the criminal activities of the enterprise.

D. Scope

1. A racketeering enterprise investigation properly initated under these guidelines may collect information concerning:

- a. The members of the enterprise and other persons likely to be knowingly acting in the furtherance of racketeering activity, provided that the information concerns such persons' activities on behalf of or in furtherance of the enterprise;
- b. the finances of the enterprise;
- c. the geographical dimensions of the enterprise; and
- d. the past and future activities and goals of the enterprise.

2. In obtaining the foregoing information, any lawful investigative technique may be used, in accordance with the requirements of paragraphs C 4 and 5 of Part I.

E. Authorization and Renewal

1. A racketeering enterprise investigation may be authorized by the Director or designated Assistant Director upon a written recommendation setting forth the facts and circumstances reasonably indicating the existence of a racketeering enterprise whose activities involve violence, extortion, or systematic public corruption. In such cases the FBI shall notify the Attorney General or his designee of the opening of the investigation. An investigation of a racketeering enterprise not involved in these activities may be authorized only by the Director upon his written determination, concurred in by the Attorney General, that such investigation is warranted by exceptional circumstances. In all investigations, the Attorney General may, as he deems necessary, request the FBI to provide a report on the status of the investigation.

2. A racketeering enterprise investigation may be initially authorized for a period of up to 180 days. An investigation may be continued upon renewed authorization for additional periods each not to exceed 180 days. Renewal authorization shall be obtained from the Director or designated Assistant Director. The concurrence of the Attorney General must also be obtained if his concurrence was initially required to authorize the investigation.

3. Investigations shall be reviewed by the Director or designated senior Headquarters official on or before the expiration of the period for which the investigation and each renewal thereof is authorized.

4. An investigation which has been terminated may be reopened upon a showing of the same standard and pursuant to the same procedures as required for initiation of an investigation.

III. Domestic Security Investigations

The Attorney General's Guidelines on Domestic Security Investigations, promulgated in 1976, shall continue to govern such investigations.

IV. Reservation

A. Nothing in these guidelines shall limit general reviews or audits of papers, files, contracts, or other records in the Government's possession, or the performance of similar services at the specific request of a department or agency of the United States. Such reviews, audits, or similar services must be for the purpose of detecting or preventing violations of federal law which are within the investigative responsibility of the FBI.

B. These Guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

Benj R Civiletti
Benjamin R. Civiletti
Attorney General

Date: 12/2/80

Office of the Attorney General
Washington, D.C. 20530

ATTORNEY GENERAL'S GUIDELINES ON FBI USE OF INFORMANTS AND CONFIDENTIAL SOURCES

The following guidelines on FBI use of informants and confidential sources are issued under the authority of the Attorney General as provided in 28 U.S.C. 509, 510, and 533. They are consistent with the requirements of the proposed FBI Charter Act, but do not depend upon passage of the Act for their effectiveness.

CONTENTS

A. Introduction

B. Definition of Confidential Source, Informant and Continuing Basis

C. General Authority

D. Required Findings of Suitability and Pertinence For Any Informant or Confidential Source Used on a Continuing Basis, Any Informant Authorized to Associate in Activities, Participation in Which Otherwise Would be Criminal, and Any Informant or Confidential Source Providing Substantial Operational Assistance in an Undercover Operation

E. Required Instructions

F. Authorized Participation by Any Informant in Criminal Activities

G. Notifying Appropriate Authorities of Unauthorized Criminal Activity by Any Informant or Confidential Source

H. Use of Any Informant or Confidential Source Under the Obligation of a Legal Privilege of Confidentiality or Affiliated with the News Media

I. Infiltration of Organization Activities by Informants or Confidential Sources Used on a Continuing Basis

J. Minimization in Domestic Security Investigations

K. Persons Represented by Counsel

L. Coordination with United States Attorneys and Other Federal Prosecutors

M. Compensation for Informants and Confidential Sources

N. Reservation

A. Introduction

(1) The courts have recognized that the government's use of informants and confidential sources is lawful and often essential to the effectiveness of properly authorized law enforcement investigations. However, use of informants and confidential sources to assist in the investigation of criminal activity may involve an element of deception, intrusion into the privacy of individuals, or cooperation with persons whose reliability and motivation can be open to question. It is proper for the FBI to use informants and confidential sources in appropriate investigations, but special care must be taken to carefully evaluate and closely supervise their use, and to ensure that individual rights are not infringed and that the government itself does not become a violator of the law. Though informants and confidential sources are not employees of the FBI, their relationship to the FBI can impose a special responsibility upon the FBI when the informant or confidential source engages in activity where he has received, or reasonably thinks he has received, encouragement or direction for that activity from the FBI.

(2) To implement these guidelines, the FBI shall issue detailed instructions to all Special Agents responsible for dealing with informants and confidential sources.

B. Definition of Confidential Source, Informant, and Continuing Basis

(1) A confidential source, under these guidelines, is any person or entity furnishing information to the FBI on a confidential basis, where such information has been obtained as a result of legitimate employment or access to records and is provided consistent with applicable law.

(2) An informant, under these guidelines, is any other person or entity furnishing information to the FBI on a confidential basis.

(3) An informant or confidential source used on a "continuing basis" is one providing information or substantial operational assistance with some degree of regularity. This may be as infrequent as a few times per year, or as frequent as several times per week.

C. General Authority

(1) An informant or confidential source may be asked to provide information already in his possession, to provide information which comes to his attention, or to affirmatively

seek out information, concerning criminal conduct or other subjects of authorized investigative activity. An informant or confidential source may also be asked to provide operational assistance to the FBI, including furnishing resources or facilities.

(2) The FBI may only use informants or confidential sources in furtherance of its authorized investigative activities and law enforcement responsibilities. Informants and confidential sources may not be used or encouraged to commit acts which the FBI could not authorize for its Special Agents.

D. Required Findings of Suitability and Pertinence For Any Informant or Confidential Source Used on a Continuing Basis, Any Informant Authorized to Associate in Activities, Participation in Which Otherwise Would be Criminal, and Any Informant or Confidential Source Providing Substantial Operational Assistance in an Undercover Operation

(1) No informant or confidential source may be used to provide information on a continuing basis, no informant may be authorized to associate in activities, participation in which otherwise would be criminal, nor may any informant or confidential source be used to provide substantial operational assistance in an undercover operation, unless the supervisory FBI official designated below has made written findings:

(a) that the informant or confidential source appears suitable for such use, and

(b) that the information likely to be obtained or the operational assistance to be provided is pertinent to authorized FBI investigative activity or law enforcement responsibilities.

Findings of suitability and pertinence shall be made by a supervisory agent designated by the Director except that in the case of a Domestic Security Investigation, the findings shall be made by a Headquarters official designated by the Director.

(2) A finding of suitability should be preceded by a preliminary inquiry concerning the proposed informant or confidential source. A preliminary inquiry may only be used to assess suitability. It may not be used to develop information concerning an individual for the purpose of inducing him to become an informant or confidential source. A preliminary inquiry can use any lawful investigative technique except mail covers, access to tax information, and any technique requiring probable cause, such as mail openings, nonconsensual electronic surveillance, or searches.

(3) In determining the suitability of an informant or confidential source, the FBI shall weigh and consider the following factors:

(a) the nature of the matter under investigation and the importance of the information or assistance being furnished;

(b) the seriousness of past and contemporaneous criminal activity of which the informant or confidential source may be suspected;

(c) the motivation of the informant or confidential source, including any consideration sought from the government for his cooperation;

(d) the likelihood that the information or assistance which an informant or confidential source could provide is not available in a timely and effective manner by less intrusive means;

(e) the informant's or confidential source's reliability and truthfulness, or the availability of means to verify information which he provides;

(f) any record of conformance by the informant or confidential source to Bureau instructions and control in past operations; how closely the Bureau will be able to monitor and control the informant's or confidential source's activities insofar as he is acting on behalf of the Bureau;

(g) the risk that use of informants or confidential sources in the particular investigation may intrude upon privileged communications, or inhibit the lawful association of individuals or expression of ideas; and

(h) any risk that use of informants or confidential sources may compromise an investigation or subsequent prosecution, including court-ordered disclosures of identity which may require the government to move for dismissal of the criminal case.

(4) A preliminary inquiry and written determination regarding suitability and pertinence should be completed

within 120 days from the date the inquiry began. FBI Headquarters may authorize one or more extensions beyond 120 days, stating in writing the facts and circumstances precluding an earlier determination.

(5) Determinations of suitability and pertinence shall be reviewed at least every 90 days by a field supervisor and at least annually by FBI Headquarters.

(6) If it is determined not to use a person or entity as an informant or confidential source, any information collected about the person or entity during the preliminary inquiry without the consent of the person or entity shall be promptly destroyed, unless it is or may become pertinent to authorized investigative activity or the person is a potential witness in a criminal prosecution. Any decision not to destroy all information about the person or entity shall be recorded with explanatory facts and circumstances in an investigative case file and shall be reviewed periodically by the SAC or designated field supervisor.

(7) At any time the FBI learns an approved informant or confidential source is no longer suitable to provide information or operational assistance, his relationship with the Bureau shall be promptly terminated. FBI Headquarters shall maintain records of informant and confidential source terminations, including a detailed statement of the reasons for each termination. These records shall be subject to periodic review by a designee of the Deputy Attorney General in a form suitable to protect the identity of the informants and confidential sources.

E. Required Instructions to

(1) Any Informant Used on a Continuing Basis, Any Informant Authorized to Associate in Activities, Participation in Which Otherwise Would be Criminal, Any Informant or Confidential Source Suspected of Substantial Involvement in Unauthorized Past or Continuing Criminal Activities, and Any Informant or Confidential Source Providing Substantial Operational Assistance in an Undercover Operation:

Each such person shall be advised that his relationship with the FBI will not protect him from arrest or prosecution for any violation of Federal, State, or local law, except where the FBI has determined pursuant to these guidelines that his association in specific activity, which otherwise would be criminal, is justified for law enforcement; and that in carrying out his assignments he shall under no circumstances participate in any act of violence, initiate or instigate a plan to commit criminal acts, or use unlawful techniques to obtain information (e.g., illegal wiretapping, illegal mail openings, breaking and entering, or criminal trespass). Such persons shall be readvised when necessary, at least annually, and at any time there is reason to suspect they are engaged in serious criminal activity.

(2) Other Confidential Sources Used on a Continuing Basis:

In place of the instructions in paragraph E(1) above, each such confidential source shall be advised that he is not acting as an agent or employee of the FBI, that he should use only lawful techniques to obtain information, and that he should provide information only in accordance with applicable law.

(3) When the FBI learns that persons under investigation intend to commit a violent crime, any informants or confidential sources used in connection with the investigation shall be instructed to try, to the extent practicable, to discourage the violence.

(4) A written record shall be made in each informant or confidential source file of the instructions noted above promptly after they are given.

F. Authorized Participation by Any Informant in Criminal Activities

An informant or confidential source shall not be authorized to engage, except in accordance with this paragraph, in any activity that would constitute a crime under state or federal law if engaged in by a private person acting without the authorization or approval of an appropriate government official. For purposes of this paragraph, such activity is referred to as "otherwise criminal" activity.

(1) A determination that participation by an informant in otherwise criminal activities is justified shall be made only by the supervisory FBI official designated in paragraphs F (2) and (3) below on the basis of his written findings that

(a) the conduct is necessary to obtain information or evidence for paramount prosecutive purposes, to establish and maintain credibility or cover with persons associated with criminal activity under investigation, or to prevent or avoid the danger of death or serious bodily injury; and

(b) this need outweighs the seriousness of the conduct involved.

(2) For purposes of these Guidelines there are two types of otherwise criminal activities -- "extraordinary," i.e., those involving a significant risk of violence, corrupt actions by high public officials, or severe financial loss to a victim, and "ordinary." A determination that participation in activities which otherwise would be "ordinary" criminal activities is justified as part of an informant's assignment shall be made by a field office supervisor or higher level official, and shall be recorded in writing in advance of any such activity, except that oral approval may be given in an emergency situation where confirmed thereafter in writing as soon as possible. The SAC shall review all such criminal activity by informants at least every 90 days.

Determinations authorizing participation in such activities may concern a single instance of otherwise criminal activity or a specified group of otherwise criminal activities.

The written determinations shall be submitted annually to Headquarters for review, and shall be subject to review by a designee of the Deputy Attorney General in a form suitable to protect the identity of the informants.

(3) A determination that participation in activities which otherwise would be "extraordinary" criminal activities is justified as part of an informant's assignment shall be made only by the SAC and only after the SAC consults with and obtains the approval of the United States Attorney. The consultation shall be in a form suitable to protect the identity of the informant. The SAC's written determination and a record of the United States Attorney's approval shall be immediately forwarded to a senior Headquarters official designated by the Director, and to the Assistant Attorney General in charge of the Criminal Division or his designee, in a form suitable to protect the identity of the informant.

If the SAC reasonably determines that an emergency situation exists requiring informant participation in activities which otherwise would be extraordinary criminal activities before approval by the United States Attorney can with due diligence by obtained, in order to protect life or substantial property, to apprehend or identify a fleeing offender, or to prevent the imminent loss of essential evidence, the SAC may approve the participation on his own authority but shall immediately notify the United States Attorney, the appropriate senior Headquarters official, and the Assistant Attorney General in charge of the Criminal Division or his designee.

In such an emergency situation the SAC shall attempt to consult by telephone with a senior member of the United States Attorney's office before approving participation.

(4) Upon approving any participation in otherwise criminal activity, the FBI shall repeat to the informant the instructions specified in paragraph E(1).

The FBI shall also seek, to the extent practicable, to provide:

(a) that the adverse effect of the activity on innocent individuals is minimized;

(b) that the informant's participation is minimized and that the informant is not the primary source of technical expertise or financial support for the activity in which he will participate;

(c) that the informant's participation in the activity is closely supervised by the FBI; and

(d) that the informant does not directly profit from his participation in the activity.

(5) Any proposal by a confidential source to engage in otherwise criminal activities in order to gather information changes the status of that individual from confidential source to informant.

G. Notifying Appropriate Authorities of Unauthorized Criminal Activity by Any Informant or Confidential Source

(1) While carrying out an FBI assignment, an informant or confidential source bears a relationship to the FBI such that his participation in any unauthorized activity in connection with the assignment associated with criminal acitivites, even of a minor character, should be carefully scrutinized and severely regarded. Hence, whenever a Special Agent learns that an informant or confidential source has participated in a criminal activity in connection with an FBI assignment which was not authorized pursuant to the procedures of paragraph F of these guidelines, the Special Agent shall notify a field office supervisor. The supervisor shall make a determination whether to notify appropriate state or local law enforcement or prosecutive authorities of any violation of law and shall make a determination whether

continued use of the informant or confidential source is justified. In exceptional circumstances where notification to state or local authorities is determined to be inadvisable, or where any request or recommendation is made to state or local authorities to delay or forego enforcement action, the FBI shall promptly notify the Assistant Attorney General in charge of the Criminal Division or his designee of the facts and circumstances concerning the informant's or confidential source's violation of law, what notification or request has been made to state or local law enforcement or prosecutive authorities, and the supporting reasons, what use will be made of any information gathered through the violation of law, and whether continued use will be made of the informant or confidential source.

(2) Informants who are in a position to have useful knowledge of criminal activities often are themselves involved in a criminal livelihood. It is recognized that in the course of using an informant or confidential source, the FBI may receive limited information concerning a variety of criminal activities by the informant or confidential source, and that in regard to less serious participation in criminal activities unconnected to an FBI assignment, it may be necessary to forego any further investigative or enforcement action in order to retain the source of information. However, whenever a Special Agent learns of the commission of a serious crime by an informant or confidential source, he shall notify a field office supervisor. The supervisor shall make a determination whether to notify appropriate state or local law enforcement or prosecutive authorities of any violation of law and shall make a determination whether continued use of the informant or confidential source is justified. In circumstances where notification to state or local authorities is determined to be inadvisable, or where any request or recommendation is made to state or local authorities to delay or forego enforcement action, the FBI shall immediately notify the Assistant Attorney General in charge of the Criminal Division or his designee of the facts and circumstances concerning the informant's or confidential source's violation of law, what notification or request has been made to state or local law enforcement or prosecutive authorities, and the supporting reasons, and what use will be made of any information gathered through the violation of law. A determination to then continue use of the informant or confidential source must be approved by the Director or a senior Headquarters official, after consultation with the Assistant Attorney General in charge of the Criminal Division or his designee.

(3) Each FBI field office shall immediately notify FBI Headquarters whenever it learns of participation by an

informant or a confidential source in a serious act of violence, even when appropriate state or local law enforcement or prosecutive authorities have been notified. Detailed records shall be maintained at Headquarters regarding each instance of informant or confidential source participation in a serious act of violence, and these records shall be subject to periodic review by a designee of the Deputy Attorney General in a form suitable to protect the identity of the informants and confidential sources. A determination to continue use of the informant or confidential source must be approved by the Director or a senior Headquarters official, after consultation with the Assistant Attorney General in charge of the Criminal Division.

(4) In determining whether to notify appropriate state or local law enforcement or prosecutive authorities of criminal activity by FBI informants and confidential sources, the FBI shall consider:

(a) whether the crime is completed, imminent or inchoate;

(b) the seriousness of the crime in terms of danger to life and property;

(c) whether the crime is a violation of federal or state law, and whether a felony, misdemeanor, or lesser offense;

(d) the degree of certainty of the information regarding the criminal activity;

(e) whether the appropriate authorities already know of the criminal activity and the informant's or confidential source's identity;

(f) the effect of notification on FBI investigative activity.

(5) Under no circumstances shall the FBI take any action to conceal a crime by one of its informants or confidential sources.

H. Informants and Confidential Sources Under the Obligation of a Legal Privilege of Confidentiality or Affiliated with the News Media

(1) A person who is under the obligation of a legal privilege of confidentiality or who is affiliated with the news media may be used as an informant or as a confidential source only upon the express approval in writing by the

Director or a designated senior Headquarters official, except that a field office supervisor may approve one-time receipt of information not collected at the request of the FBI where the particular information is unprivileged.

The FBI shall promptly give written notice, or oral notice confirmed in writing, to the Assistant Attorney General in charge of the Criminal Division or his designee of any such Headquarters authorization. The notice shall include sufficient information to allow meaningful review, and shall set forth the reasons why the individual should be used as an informant or confidential source.

(2) Any such person approved as an informant or confidential source shall be advised by the FBI that in seeking information from him, the FBI is not requesting and does not advocate breach of any legal obligation of confidentiality. A record shall be made and kept in the informant or confidential source file when the advice has been given. This advice shall be provided before accepting information on a continuing basis.

(3) If, despite the advice to the informant or confidential source that revelation of privileged information is not requested or advocated, he offers to provide information that is privileged or arguably privileged, the offer shall not be accepted unless a field office supervisor determines that serious consequences would ensue from rejection of the offer, such as physical injury to an individual or severe property damage. A report concerning such information and the circumstances that warranted its acceptance shall be promptly forwarded to FBI Headquarters.

If the information is spontaneously provided by the informant or confidential source, without any offer that would alert the Special Agent to the nature of the information, in circumstances which do not meet the standard of serious consequences, the information may be recorded in suitable form for the purpose of establishing that the problem was recognized and that no use was made of the information in the conduct of any investigation.

(4) Regardless of state law, the procedures of this section must be followed for any licensed physican, any person admitted to practice law in a court of a state, any practicing clergyman, and any member of the news media.

I. Infiltration of Organization Activities by Informants or Confidential Sources Used on a Continuing Basis

(1) The lawful activities of legitimate organizations are, of course, not subject to investigation. However,

individual members of such organizations may be independently involved in criminal activities. In order to assure that the privacy of constitutionally-protected activities will be respected, the FBI should carefully regulate use of informants and confidential sources who will make use of affiliations with legitimate organizations in order to gather information concerning the activities of individual members.

In particular, when, to obtain information,

(a) an informant or confidential source will make use of formal affiliation with an organization that has a predominantly legitimate purpose, and the informant's or confidential source's formal affiliation will give him continued access to nonpublic information related to the legitimate purposes of the organization; or

(b) an informant or confidential source will make use of formal or informal affiliation with an organization that is predominantly engaged in political activities,

the determination to use the person as an informant or confidential source on a continuing basis shall be made by the ASAC or SAC.

(2) In determining whether the use of such an affiliated person as an informant or confidential source on a continuing basis is appropriate, the ASAC or SAC should consider:

(a) the likelihood of responsible behavior by the informant or confidential source during the course of his organizational membership;

(b) the ability of the FBI to focus the informant's or confidential source's reporting on members of the organization involved in criminal activities and to minimize adverse impact on innocent members of the organization; and

(c) whether the use of the informant or confidential source might inhibit free association or expression of ideas by innocent members of the organization in the future, or hinder the ability of the organization to function effectively.

(3) In approving the use of such an affiliated person as an informant or confidential source on a continuing basis, the ASAC or SAC shall establish procedures, recorded

in writing, to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity.

(4) Nothing in this paragraph limits the authority of the FBI to conduct otherwise proper investigations of illegitimate organizations or organizations engaged in unlawful activities. See the Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations, and on Domestic Security Investigations.

J. Minimization in Domestic Security Investigations

In approving use of an informant or confidential source to infiltrate a group under investigation as part of a Domestic Security Investigation, or in recruiting a person from within such a group as an informant or confidential source, an FBI Headquarters official shall establish procedures, recorded in writing, to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity.

K. Persons Represented by Counsel

Whenever an individual is known to be represented by counsel in a particular matter, the FBI shall follow applicable law and Department procedure concerning contact with represented individuals in the absence of prior notice to their counsel. The SAC or his designee and the United States Attorney shall consult periodically on applicable law and Department procedure.

L. Coordination with United States Attorneys and Other Federal Prosecutors

In any matter presented to a United States Attorney or other federal prosecutor for legal action (including prosecution, grand jury investigation, application for a search warrant, or application for a wiretap), where the matter has involved the use of an informant or a confidential source in any way or degree, the FBI shall take the initiative to provide full disclosure to the federal prosecutor concerning the nature and scope of the informant's or confidential source's participation in the matter.

If the FBI deems it necessary to withhold certain information to protect the informant's or confidential source's identity from possible compromise, it shall inform the prosecutor of the general nature of the information that is being withheld.

M. Compensation for Informants and Confidential Sources

(1) The FBI may pay informants and confidential sources a reasonable amount of money or provide other lawful consideration for information furnished, services rendered, or expenses incurred in authorized investigative activity. No payment of money or other consideration, other than a published reward, shall be conditioned on the conviction of any particular individual.

(2) In investigations involving serious crimes or the expenditure of extensive investigative resources, the FBI may compensate informants or confidential sources with an extraordinary payment in excess of $25,000. The Attorney General shall be informed of any such extraordinary payment as he deems necessary.

(3) Where practicable, compensation agreements with informants or confidential sources in connection with a significant FBI undercover operation shall provide that compensation will depend on compliance with the obligation of confidentiality for investigative information, and shall further provide that any profits derived from a violation of the obligation shall be forfeited to the United States.

N. Reservation

These guidelines on the use of informants and confidential sources are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

Benjamin R. Civiletti
Attorney General

Date: 12/2/80

Office of the Attorney General
Washington, D.C. 20530

DEC 15 1976

TO: Clarence M. Kelley
Director
Federal Bureau of Investigation

FROM: Edward H. Levi
Attorney General

SUBJECT: USE OF INFORMANTS IN DOMESTIC SECURITY, ORGANIZED CRIME, AND OTHER CRIMINAL INVESTIGATIONS

Courts have recognized that the government's use of informants is lawful and may often be essential to the effectiveness of properly authorized law enforcement investigations. However, the technique of using informants to assist in the investigation of criminal activity, since it may involve an element of deception and intrusion into the privacy of individuals or may require government cooperation with persons whose reliability and motivation may be open to question, should be carefully limited. Thus, while it is proper for the FBI to use informants in appropriate investigations, it is imperative that special care be taken not only to minimize their use but also to ensure that individual rights are not infringed and that the government itself does not become a violator of the law. Informants as such are not employees of the FBI, but the relationship of an informant to the FBI imposes a special responsibility upon the FBI when the informant engages in activity where he has received, or reasonably thinks he has received, encouragement or direction for that activity from the FBI.

To fulfill this responsibility, it is useful to formulate in a single document the limitations on the activities of informants and the duties of the FBI with respect to informants, even though many of these limitations and duties are set forth in individual instructions or recognized in existing practice.

As a fundamental principle, it must be recognized that an informant is merely one technique used in the course of authorized investigations. The FBI may not use informants where it is not authorized to conduct an investigation nor may informants be used for acts or encouraged to commit acts which the FBI could not authorize for its undercover Agents. When an FBI informant provides information concerning planned criminal activity which is not within the investigative jurisdiction of the FBI, the FBI shall advise the law enforcement agency having investigative jurisdiction. If the circumstanc are such that it is inadvisable to have the informant report directly to the agency having investigative jurisdiction, the FBI, in cooperation with that agency, may continue to operate the informant.

A. Use of Informants

In considering the use of informants in an authorized investigation, the FBI should weigh the following factors --

1. the risk that use of an informant in a particular investigation or the conduct of a particular informant may, contrary to instructions, violate individual rights, intrud upon privileged communications, unlawfully inhibit the free association of individuals or the expression of ideas, or compromise in any way the investigation or subsequent prosecution.

2. the nature and seriousness of the matter under investigation, and the likelihood that information which an informant could provide is not readily available through other sources or by more direct means.

3. the character and motivation of the informant himself; his past or potential involvement in the matter under investigation or in related criminal activity; his proven reliability and truthfulness or the availability of means to verify information which he provides.

4. the measure of the ability of the FBI to control th informant's activities insofar as he is acting on behalf of the Bureau and ensure that his conduct will be consistent with applicable law and instructions.

5. the potential value of the information he may be able to furnish in relation to the consideration he may be seeking from the government for his cooperation.

B. Instructions to Informants

The FBI shall instruct all informants it uses in domestic security, organized crime, and other criminal investigations that in carrying out their assignments they shall not:

1. participate in acts of violence; or
2. use unlawful techniques (e.g., breaking and entering, electronic surveillance, opening or otherwise tampering with the mail) to obtain information for the FBI; or
3. initiate a plan to commit criminal acts; or
4. participate in criminal activities of persons under investigation, except insofar as the FBI determines that such participation is necessary to obtain information needed for purposes of federal prosecution.

Whenever the FBI learns that persons under investigation intend to commit a violent crime informants used in connection with the investigation shall be instructed to try to discourage the violence.

C. Violations of Instructions and Law

1. Under no circumstances shall the FBI take any action to conceal a crime by one of its informants.

2. Whenever the FBI learns that an informant used in investigating criminal activity has violated the instructions set forth above in furtherance of his assignment, it shall ordinarily notify the appropriate law enforcement or prosecutive authorities promptly of any violation of law, and make a determination whether continued use of the informant is justified. In those exceptional circumstances in which notification to local authorities may be inadvisable, the FBI shall immediately notify the Department of Justice of the facts and circumstances concerning the investigation and the informant's law violation, and provide its recommendation on reporting the violation and on continued use of the informa The Department shall determine:

a. when law enforcement or prosecutive authorities should be notified of the law violation;

b. what use, if any, should be made of the information gathered through the violation of law, as well as the disposition and retention of such information; and

c. whether continued use should be made of the informant by the FBI.

3. Whenever the FBI has knowledge of the actual commi sion of a serious crime by one of its informants unconnecte with his FBI assignment, it shall ordinarily notify the app priate law enforcement or prosecutive authorities promptly make a determination whether continued use of the informant justified. In those exceptional circumstances in which notification to local authorities may be inadvisable, the F shall promptly advise the Department of Justice of the fact and circumstances concerning the investigation and the informant's law violation, and provide its recommendation o reporting the violation and on continued use of the informa The Department of Justice shall determine:

a. when law enforcement or prosecutive authorities should be notified of the law violation; and

b. whether continued use should be made of the informant by the FBI.

4. In determining the advisability of notifying appropriate law enforcement and prosecutive authorities of crimin activity by FBI informants the FBI and the Department of Justice shall consider the following factors:

a. whether the crime is completed, imminent or inchoate;

b. seriousness of the crime in terms of danger to life and property;

c. whether the crime is a violation of federal or state law, and whether a felony, misdemeanor or lesser offense;

d. the degree of certainty of the information regarding the criminal activity;

e. whether the appropriate authorities already know of the criminal activity and the informant's identity; and

f. the significance of the information the informant is providing, or will provide, and the effect on the FBI investigative activity of notification to the other law enforcement agency.

Office of the Attorney General
Washington, D.C. 20530

ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS

The following guidelines on use of undercover operations by the Federal Bureau of Investigation are issued under authority of the Attorney General as provided in 28 U.S.C. 509, 510, and 533. They are consistent with the requirements of the proposed FBI Charter Act, but do not depend upon passage of the Act for their effectiveness.

INTRODUCTION

DEFINITIONS

GENERAL AUTHORITY

AUTHORIZATION OF UNDERCOVER OPERATIONS

A. Undercover Operations that May Not be Approved by the Special Agent in Charge because of Fiscal Circumstances

B. Undercover Operations that May Not be Approved by the Special Agent in Charge Because of Sensitive Circumstances

C. Undercover Operations that May be Approved by the Special Agent in Charge

D. Approval by Headquarters (Undercover Operations Review Committee, and Director or Designated Assistant Director), with Concurrence of United States Attorney or Strike Force Chief, Where Sensitive or Fiscal Circumstances Are Present

E. Applications to Headquarters

F. Undercover Operations Review Committee

G. Approval by Director or Deisgnated Assistant Director

H. Duration of Authorizations

I. Authorization of Participation In "Otherwise Illegal" Activity

J. Authorization of the Creation of Opportunities for Illegal Activity

K. Authorization of Investigative Interviews That are Not Part of an Undercover Operation

MONITORING AND CONTROL OF UNDERCOVER OPERATIONS

L. Continuing Consultation with United States Attorney or Strike Force Chief

M. Serious Legal, Ethical, Prosecutive, or Departmental Policy Questions, and Previously Unforeseen Sensitive Circumstances

N. Emergency Authorization

O. Annual Report of Undercover Operations Review Committee

P. Preparation of Undercover Employees

Q. Review of Undercover Employee Conduct

R. Deposit of Proceeds; Liquidation of Proprietaries

RESERVATION

INTRODUCTION

The FBI's use of undercover employees and operation of proprietary business entities is a lawful and essential technique in the detection and investigation of white collar crime, political corruption, organized crime, and other priority areas. However, use of this technique inherently involves an element of deception, and occasionally may require a degree of cooperation with persons whose motivation and conduct are open to question, and so should be carefully considered and monitored.

DEFINITIONS

An "undercover employee," under these guidelines, is any employee of the FBI -- or employee of a federal, state or local law enforcement agency working under the direction and control of the FBI in a particular investigation -- whose relationship with the FBI is concealed from third parties in the course of an investigative operation by the maintenance of a cover or alias identity.

An "undercover operation" is any investigative operation in which an undercover employee is used.

A "proprietary" is a sole proprietorship, partnership, corporation, or other business entity owned or controlled by the FBI, used by the FBI in connection with an undercover operation, and whose relationship with the FBI is not generally acknowledged.

GENERAL AUTHORITY

(1) The FBI may conduct undercover operations, pursuant to these guidelines, that are appropriate to carry out its investigative responsibilities in domestic law enforcement.

Under this authority, the FBI may participate in joint undercover operations with other federal, state, and local law enforcement agencies; may seek operational assistance for an undercover operation from any suitable informant, confidential source, or other cooperating private individual; and may operate a proprietary on a commercial basis to the extent necessary to maintain an operation's cover or effectiveness.

(2) Undercover operations can be authorized only at the "full investigation" stage in Domestic Security Investigations.

AUTHORIZATION OF UNDERCOVER OPERATIONS

All undercover operations under these guidelines fall into one of two categories: (1) those undercover operations that can be approved by the Special Agent in Charge (SAC) under his own authority, and (2) those undercover operations that can only be authorized by the Director or designated Assistant Director, upon favorable recommendations by the SAC, Bureau headquarters (FBIHQ), and the Undercover Operations Review Committee. Undercover operations in the latter category are those that involve a substantial expenditure of government funds, or otherwise implicate fiscal policies and considerations. (Paragraph A). Also included in this latter category are undercover operations that involve what are termed "sensitive circumstances." In general, these are undercover operations involving investigation of public corruption, or undercover operations that involve risks of various forms of harm and intrusion. (Paragraph B). Of course, in planning an undercover operation, these risks of harm and intrusion will be avoided whenever possible, consistent with the need to obtain necessary evidence in a timely and effective manner.

A. Undercover Operations that May Not be Approved by the Special Agent in Charge because of Fiscal Circumstances

(1) Subject to the emergency authorization procedures set forth in paragraph N, the SAC may not authorize the establishment, extension or renewal of an undercover operation if there is a reasonable expectation that:

(a) The undercover operation could result in significant civil claims against the United States, either arising in tort, contract or claims for just compensation for the "taking" of property;

(b) The undercover operation will require leasing or contracting for property, supplies, services, equipment, or facilities for any period extending beyond the September 30 termination date of the then current fiscal year, or with prepayment of more than one month's rent; or will require leasing any facilities in the District of Columbia;

(c) The undercover operation will require the use of appropriated funds to establish or acquire a proprietary, or to operate such a proprietary on a commercial basis;

(d) The undercover operation will require the deposit of appropriated funds, or of proceeds generated by the undercover operation, in banks or other financial institutions;

(e) The undercover operation will involve use of proceeds generated by the undercover operation to offset necessary and reasonable expenses of the operation;

(f) The undercover operation will require indemnification agreements for losses incurred in aid of the operation, or will require expenditures in excess of $1500 for property, supplies, services, equipment or facilities, or for the construction or alteration of facilities;

(g) The undercover operation will last longer than 6 months or will involve an expenditure in excess of $20,000 or such other amount that is set from time to time by the Director, with the approval of the Attorney General. However, this expenditure limitation shall not apply where a significant and unanticipated investigative opportunity would be lost by compliance with the procedures set forth in paragraphs D, E, F, and G.

B. Undercover Operations that May not be Approved by the Special Agent in Charge Because of Sensitive Circumstances

Subject to the emergency authorization procedures set forth in paragraph N, the SAC may not authorize the establishment, extension or renewal of an undercover operation that involves sensitive circumstances. For purposes of these guidelines, an undercover operation involves sensitive circumstances if there is a reasonable expectation that:

(a) The undercover operation will concern an investigation of possible corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a religious or political organization, or the activities of the news media;

(b) The undercover operation will involve untrue representations by an undercover employee or cooperating private individual concerning the activities or involvement of any innocent person;

(c) An undercover employee or cooperating private individual will engage in any activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime -- except this shall not include criminal liability for the purchase of stolen or contraband goods or for the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary;

(d) An undercover employee or cooperating private individual will seek to supply an item or service that would be reasonably unavailable to criminal actors but for the participation of the government;

(e) An undercover employee or cooperating private individual will run a significant risk of being arrested and seeking to continue undercover;

(f) An undercover employee or cooperating private individual will be required to give sworn testimony in any proceeding in an undercover capacity;

(g) An undercover employee or cooperating private individual will attend a meeting between a subject of the investigation and his lawyer;

(h) An undercover employee or cooperating private individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will be led into a professional or confidential relationship with the undercover employee or cooperating private individual as a result of the pose;

(i) A request for information will be made by an undercover employee or cooperating individual to an attorney, physician, clergyman, or other person who is under the obligation of a legal privilege of confidentiality, and the particular information would ordinarily be privileged;

(j) A request for information will be made by an undercover employee or cooperating private individual to a member of the news media concerning any individual with whom the newsman is known to have a professional or confidential relationship;

(k) The undercover operation will be used to infiltrate a group under investigation as part of a Domestic Security Investigation, or to recruit a person from within such a group as an informant;

(l) There may be a significant risk of violence or physical injury to individuals or a significant risk of financial loss to an innocent individual.

C. Undercover Operations that May be Approved by the Special Agent in Charge

(1) The SAC may authorize the establishment, extension or renewal of all other undercover operations, to be supervised by his field office, upon his written determination, stating supporting facts and circumstances, that:

(a) Initiation of investigative activity regarding the alleged criminal conduct or criminal enterprise is warranted under the Attorney General's Guidelines on the Investigation of General Crimes, the Attorney General's Guidelines on Domestic Security Investigations, the Attorney General's Guidelines on Investigation of Criminal Enterprises Engaged in Racketeering Activity, and any other applicable guidelines;

(b) The proposed undercover operation appears to be an effective means of obtaining evidence or necessary information; this should include a statement of what prior investigation has been conducted, and what chance the operation has of obtaining evidence or necessary information concerning the alleged criminal conduct or criminal enterprise;

(c) The undercover operation will be conducted with minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner;

(d) Approval for the use of any informant or confidential source has been obtained as required by the Attorney General's Guidelines on Use of Informants and Confidential Sources;

(e) There is no present expectation of the occurrence of any of the circumstances listed in paragraphs A and B;

(f) Any foreseeable participation by an undercover employee or cooperating private individual in illegal activity that can be approved by a SAC on his own authority (that is, the purchase of stolen or contraband goods, or participation in a nonserious misdemeanor), is justified by the factors noted in paragraph 1(1).

D. Approval by Headquarters (Undercover Operations Review Committee, and Director or Designated Assistant Director), with Concurrence of United States Attorney or Strike Force Chief, Where Sensitive or Fiscal Circumstances Are Present

The Director of the FBI or a designated Assistant Director must approve the establishment, extension, or renewal of an undercover operation if there is a reasonable expectation that any of the circumstances listed in paragraphs A and B may occur.

In such cases, the SAC shall first make application to FBI Headquarters (FBIHQ). See paragraph E below. FBIHQ may either disapprove the application or recommend that it be approved. A recommendation for approval may be forwarded directly to the Director or designated Assistant Director if the application was submitted to FBIHQ solely because of a fiscal circumstance listed in paragraph A(b)-(e). In all other cases in which FBIHQ recommends approval, the application shall be forwarded to the Undercover Operations Review Committee for consideration. See paragraph E. If approved by the Undercover Operations Review Committee, the application shall be forwarded to the Director or designated Assistant Director. See paragraph G. The Director or designated Assistant Director may approve or disapprove the application.

E. Applications to Headquarters

(1) Each application to Headquarters from a SAC recommending approval of the establishment, extension, or renewal of an undercover operation involving circumstances listed in paragraphs A and B shall be made in writing and shall include, with supporting facts and circumstances:

(a) A description of the proposed undercover operation, including the particular cover to be employed and any informants or other cooperating persons who will assist in the operation; a description of the particular offense or criminal enterprise under investigation, and any individuals known to be involved; and a statement of the period of time for which the undercover operation would be maintained;

(b) A description of how the determinations required by paragraph C(1)(a) - (d) have been met;

(c) A statement of which circumstances specified in paragraphs A and B are reasonably expected to occur, what the operative facts are likely to be, and why the undercover operation merits approval in light of the circumstances, including,

(i) for any foreseeable participation by an undercover employee or cooperating private individual in activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime -- but not including the purchase of stolen or contraband goods or making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary -- a statement why the participation is justified by the factors noted in paragraph I(1), and a statement of the federal prosecutor's approval pursuant to paragraph I(2);

(ii) for any planned infiltration by an undercover employee or cooperating private individual of a group under investigation as part of a Domestic Security Investigation, or recruitment of a person from within such a group as an informant, a statement why the infiltration or recruitment is necessary and meets the requirements of the Attorney General's Guidelines on Domestic Security Investigations; and a description of procedures to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity.

(d) A statement of proposed expenses;

(e) A statement that the United States Attorney or Strike Force Chief is knowledgeable about the proposed operation, including the sensitive circumstances reasonably expected to occur; concurs with the proposal and its objectives and legality; and agrees to prosecute any meritorious case that is developed.

(2) In the highly unusual event that there are compelling reasons that either the United States Attorney or Strike Force Chief should not be advised of the proposed undercover operation, the Assistant Attorney General in charge of the Criminal Division, or other Department of Justice attorney designated by him, may substitute for such person(s) for purposes of any authorization or other function required by these guidelines. Where the SAC determines that such substitution is necessary, the application to FBIHQ shall include a statement of the compelling reasons, together with supporting facts and circumstances, which are believed to justify that determination. Such applications may only be authorized pursuant to the procedures prescribed in paragraph F, below, whether or not consideration by the Undercover Operations Review Committee is otherwise required, and upon the approval of the Assistant Attorney General in charge of the Criminal Division.

(3) An application for the extension or renewal of authority to engage in an undercover operation should also describe the results so far obtained from the operation or a reasonable explanation of any failure to obtain significant results, and a statement that the United States Attorney or Strike Force Chief favors the extension or renewal of authority.

F. Undercover Operations Review Committee

(1) There shall be an Undercover Operations Review Committee, consisting of appropriate employees of the FBI

designated by the Director, and attorneys of the Department of Justice designated by the Assistant Attorney General in charge of the Criminal Division, to be chaired by a designee of the Director.

(2) Upon receipt from FBIHQ of a SAC's application for approval of an undercover operation, the Committee will review the application. The Justice Department members of the Committee may consult with senior Department officials and the United States Attorney or Strike Force Chief, as they deem appropriate. If the Committee concurs in the determinations contained in the application, and finds that in other respects the undercover operation should go forward, see paragraph F(3) and (4) below, the Committee is authorized to recommend to the Director or designated Assistant Director, see paragraph G, that approval be granted.

(3) In reviewing the application, the Committee shall carefully assess the contemplated benefits of the undercover operation, together with the operating and other costs of the proposed operation. In assessing the costs of the undercover operation, the Committee shall consider, where relevant, the following factors, among others:

(a) the risk of harm to private individuals or undercover employees;

(b) the risk of financial loss to private individuals and businesses, and the risk of damage liability or other loss to the government;

(c) the risk of harm to reputation;

(d) the risk of harm to privileged or confidential relationships;

(e) the risk of invasion of privacy;

(f) the degree to which the actions of undercover employees or cooperating private individuals may approach the conduct proscribed in paragraph J below; and

(g) the suitability of undercover employees' or cooperating private individuals' participating in activity of the sort contemplated during the undercover operation.

(4) If the proposed undercover operation involves any of the sensitive circumstances listed in paragraph B, the Committee shall also examine the application to determine whether the

undercover operation is planned so as to minimize the incidence of such sensitive circumstances, and to minimize the risks of harm and intrusion that are created by such circumstances. If the Committee recommends approval of an undercover operation involving sensitive circumstances, the recommendation shall include a brief written statement explaining why the undercover operation merits approval in light of the anticipated occurrence of such sensitive circumstances.

(5) The Committee shall recommend approval of an undercover operation only upon reaching a consensus, provided that:

(a) If one or more of the designees of the Assistant Attorney General in charge of the Criminal Division does not join in a recommendation for approval of a proposed undercover operation because of legal, ethical, prosecutive or Departmental policy considerations, the designee shall promptly advise the Assistant Attorney General and there shall be no approval of the establishment, extension, or renewal of the undercover operation until the Assistant Attorney General has had the opportunity to consult with the Director;

(b) If, upon consultation, the Assistant Attorney General disagrees with a decision by the Director to approve the proposed undercover operation, there shall be no establishment, extension or renewal of the undercover operation until the Assistant Attorney General has had an opportunity to refer the matter to the Deputy Attorney General or Attorney General.

(6) The Committee should consult the Legal Counsel Division of the FBI, and the Office of Legal Counsel or other appropriate division or office in the Department of Justice, about any significant unsettled legal questions concerning authority for or the conduct of a proposed undercover operation.

G. Approval by Director or Designated Assistant Director

The Director or a designated Assistant Director shall have authority to approve operations recommended for approval by the Undercover Operations Review Committee, provided that only the Director may authorize a proposed operation if a reasonable expectation exists that:

(a) There may be a significant risk of violence or physical injury to individuals;

(b) The undercover operation will be used to infiltrate a group under investigation as part of a Domestic Security Investigation, or to recruit a person from within such a group as an informant or confidential source, in which case the Director's authorization shall include a statement of procedures to minimize any acquisition, retention, and dissemination of information that does not relate to the matter under investigation or to any other authorized investigative activity; or

(c) A circumstance specified in paragraph A(b)-(e) is reasonably expected to occur, in which case the undercover operation may be implemented only after the Deputy Attorney General or Attorney General has specifically approved that aspect of the operation in accordance with applicable law.

H. Duration of Authorizations

(1) An undercover operation may not continue longer than is necessary to achieve the objective of the authorization, nor in any event longer than 6 months without new authorization to proceed.

(2) Any undercover operation initially approved by a SAC must be reauthorized by an Assistant Director or the Director, pursuant to paragraphs D-G, if it lasts longer than 6 months or involves expenditures in excess of the amount prescribed in paragraph A(g).

I. Authorization of Participation In "Otherwise Illegal" Activity

Nothwithstanding any other provision of these guidelines, an undercover employee or cooperating private individual shall not engage, except in accordance with this paragraph, in any activity that would constitute a crime under state or federal law if engaged in by a private person acting without the approval or authorization of an appropriate government official. For purposes of this paragraph, such activity is referred to as "otherwise illegal" activity.

(1) No official shall recommend or approve an undercover employee's, or cooperating private individual's planned or reasonably foreseeable participation in otherwise illegal activity unless the participation is justified in order:

(a) to obtain information or evidence necessary for paramount prosecutive purposes;

(b) to establish and maintain credibility or cover with persons associated with the criminal activity under investigation; or

(c) to prevent or avoid the danger of death or serious bodily injury.

(2) Participation in any activity that is proscribed by federal, state, or local law as a felony or that is otherwise a serious crime -- but not including the purchase of stolen or contraband goods or the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary -- must be approved in advance by an Assistant Director on the recommendation of the Undercover Operations Review Committee pursuant to paragraphs D-G, except that the Director's approval is required for participation in any otherwise illegal activity involving a significant risk of violence or physical injury to individuals. Approvals shall be recorded in writing.

A recommendation to FBIHQ for approval of participation in such otherwise illegal activity must include the views of the United States Attorney, Strike Force Chief, or Assistant Attorney General on why the participation is warranted.

(3) Participation in the purchase of stolen or contraband goods, or in a nonserious misdemeanor, must be approved in advance by the Special Agent in Charge. Approvals by the SAC shall be recorded in writing.

(4) The FBI shall take reasonable steps to minimize the participation of an undercover employee or cooperating private individual in any otherwise illegal activity.

(5) An undercover employee or cooperating private individual shall not participate in any act of violence, initiate or instigate any plan to commit criminal acts, or use unlawful investigative techniques to obtain information or evidence for the FBI (e.g., illegal wiretapping, illegal mail openings, breaking and entering, or trespass amounting to an illegal search).

(6) If it becomes necessary to participate in otherwise illegal activity that was not foreseen or anticipated, an undercover employee should make every effort to consult with the SAC. "For otherwise illegal activity that is a felony or a serious misdemeanor, the SAC can provide emergency authorization

under paragraph N. If consultation with the SAC is impossible and there is an immediate and grave threat to life or physical safety (including destruction of property through arson or bombing), an undercover employee may participate in the otherwise illegal activity so long as he does not take part in and makes every effort to prevent any act of violence. A report to the SAC shall be made as soon as possible after the participation, and the SAC shall submit a full report to FBIHQ. FBIHQ shall promptly inform the members of the Undercover Operations Review Committee.

(7) Nothing in these guidelines prohibits establishing, funding, and maintaining secure cover for an undercover operation by making false representations to third parties in concealment of personal identity or the true ownership of a proprietary (e.g., false statements in obtaining driver's licenses, vehicle registrations, occupancy permits, and business licenses) when such action is approved in advance by the appropriate SAC.

(8) Nothing in paragraph I(5) or (6) prohibits an undercover employee from taking reasonable measures of self defense in an emergency to protect his own life or the life of others against wrongful force. Such measures shall be reported to the SAC and the United States Attorney, Strike Force Chief, or Assistant Attorney General as soon as possible.

(9) If a serious incident of violence should occur in the course of a criminal activity and an undercover employee or cooperating private individual has participated in any fashion in the criminal activity, the SAC shall immediately inform FBIHQ. Headquarters shall promptly inform the Assistant Attorney General in charge of the Criminal Division.

J. Authorization of the Creation of Opportunities for Illegal Activity

(1) Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in illegal activity in which he would otherwise not be disposed to engage.

(2) In addition to complying with any legal requirements, before approving an undercover operation involving an invitation to engage in illegal activity, the approving authority should be satisfied that

(a) The corrupt nature of the activity is reasonably clear to potential subjects;

(b) There is a reasonable indication that the undercover operation will reveal illegal activities; and

(c) The nature of any inducement is not unjustifiable in view of the character of the illegal transaction in which the individual is invited to engage.

(3) Under the law of entrapment, inducements may be offered to an individual even though there is no reasonable indication that that particular individual has engaged, or is engaging, in the illegal activity that is properly under investigation. Nonetheless, no such undercover operation shall be approved without the specific written authorization of the Director, unless the Undercover Operations Review Committee determines (See paragraph F), insofar as practicable, that either

(a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or

(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

(4) In any undercover operation, the decision to offer an inducement to an individual, or to otherwise invite an individual to engage in illegal activity, shall be based solely on law enforcement considerations.

K. Authorization of Investigative Interviews that are Not Part of an Undercover Operation

Notwithstanding any other provision of these guidelines, routine investigative interviews that are not part of an undercover operation may be conducted without the authorization of FBIHQ, and without compliance with paragraphs C, D, and E. These include so-called "pretext" interviews, in which an FBI employee uses an alias or cover identity to conceal his relationship with the FBI.

However, this authority does not apply to an investigative interview that involves a sensitive circumstance listed in paragraph B. Any investigative interview involving a sensitive circumstance -- even an interview that is not conducted as part of an undercover operation -- may only be approved pursuant to the procedures set forth in paragraphs D, E, F, and G, or pursuant to the emergency authority prescribed in paragraph N, if applicable.

MONITORING AND CONTROL OF UNDERCOVER OPERATIONS

L. Continuing Consultation with United States Attorney or Strike Force Chief

Throughout the course of any undercover operation that has been approved by Headquarters, the SAC shall consult periodically with the United States Attorney, Strike Force Chief, or Assistant Attorney General concerning the plans and tactics and anticipated problems of the operation.

M. Serious Legal, Ethical, Prosecutive, or Departmental Policy Questions, and Previously Unforeseen Sensitive Circumstances

(1) In any undercover operation, the SAC shall consult with Headquarters whenever a serious legal, ethical, prosecutive, or Departmental policy question is presented by the operation. FBIHQ shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of any such question and its proposed resolution.

(2) This procedure shall always be followed if an undercover operation is likely to involve one of the circumstances listed in paragraphs A and E and either (a) The SAC's application to FBIHQ did not contemplate the occurrence of that circumstance, or (b) the undercover operation was approved by the SAC under his own authority. In such cases the SAC shall also submit a written application for continued authorization of the operation or an amendment of the existing application to Headquarters pursuant to paragraph E.

Whenever such a new authorization or amended authorization is required, the FBI shall consult with the United States Attorney, Strike Force Chief, or Assistant Attorney General, and with the Department of Justice members of the Undercover Operations Review Committee on whether to modify, suspend, or terminate the undercover operation pending full processing of the application or amendment.

N. Emergency Authorization

Notwithstanding any other provision of these guidelines, any SAC who reasonably determines that:

(a) an emergency situation exists requiring the establishment, extension, renewal, or modification of an undercover operation before an authorization mandated by these guidelines can with due diligence be obtained, in order to protect life or substantial property, to apprehend or identify a fleeing offender, to prevent the hiding or destruction of essential evidence, or to avoid other grave harm; and

(b) there are grounds upon which authorization could be obtained under these guidelines, may approve the establishment, extension, renewal, or modification of an undercover operation if a written application for approval is submitted to Headquarters within 48 hours after the undercover operation has been established, extended, renewed, or modified. In such an emergency situation the SAC shall attempt to consult by telephone with the United States Attorney, Strike Force Chief, or Assistant Attorney General, and with a designated Assistant Director. FBIHQ shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of the emergency authorization. In the event the subsequent written application for approval is denied, a full report of all activity undertaken during the course of the operation shall be submitted to the Director, who shall inform the Deputy Attorney General.

O. Annual Report of Undercover Operations Review Committee

(1) The Undercover Operations Review Committee shall retain a file of all applications for approval of undercover operations submitted to it, together with a written record of the Committee's action on the applications and any ultimate disposition by the Director or a designated Assistant Director. The FBI shall also prepare a short summary of each undercover operation approved by the Committee. These records and summaries shall be available for inspection by a designee of the Deputy Attorney General or of the Assistant Attorney General in charge of the Criminal Division.

(2) On an annual basis, the Committee shall submit to the Director, the Attorney General, the Deputy Attorney General, and the Assistant Attorney General in charge of the Criminal Division, a written report summarizing: (a) the types of undercover operations approved; and (b) the major issues addressed by the Committee in reviewing applications and how they were resolved.

P. Preparation of Undercover Employees

(1) The SAC or a designated supervisory agent shall review with each undercover employee prior to the employee's participation in an investigation, the conduct that the undercover employee is expected to undertake and other conduct whose necessity during the investigation is foreseeable. The SAC or designated supervisory agent shall expressly discuss with each undercover employee any of the circumstances specified in paragraphs A and B which is reasonably expected to occur.

Each undercover employee shall be instructed generally, and in relation to the proposed undercover operation, that he shall not participate in any act of violence; initiate or instigate any plan to commit criminal acts; use unlawful investigative techniques to obtain information or evidence; or engage in any conduct that would violate restrictions on investigative techniques or FBI conduct contained in Attorney General Guidelines or other Department policy; and that, except in an emergency situation, he shall not participate in any illegal activity for which authorization has not been obtained under these guidelines. When the FBI learns that persons under investigation intend to commit a violent crime, any undercover employee used in connection with the investigation shall be instructed to try to discourage the violence.

(2) To the extent feasible, a similar review shall be conducted by a Special Agent with each cooperating private individual.

Q. Review of Undercover Employee Conduct

(1) From time to time during the course of the investigation, as is practicable, the SAC or designated supervisory agent shall review the actual conduct of the undercover employee, as well as the employee's proposed or reasonably foreseeable conduct for the remainder of the investigation, and shall make a determination whether the conduct of the employee has been permissible. This determination shall be communicated to the undercover employee as soon as practicable. Any findings of impermissible conduct shall be promptly reported to the Director, and consultation with the Director shall be undertaken before the employee continues his participation in the investigation. To the extent feasible, a similar review shall be made of the conduct of each cooperating private individual.

(2) A written report on the use of false representations to third parties in concealment of personal identity or the true ownership of a proprietary, for establishing, funding, and maintaining secure cover for an undercover operation, shall be submitted to the SAC or designated supervisory agent at the conclusion of the undercover operation. A written report on participation in any other activity proscribed by federal, state or local law shall be made by an undercover employee to the SAC or designated supervisory agent every 60 days and at the conclusion of the participation in the illegal activity.

R. Deposit of Proceeds; Liquidation of Proprietaries

As soon as the proceeds from an undercover operation are no longer necessary for the conduct of the operation, the remaining proceeds shall be deposited in the Treasury of the United States as miscellaneous receipts.

Whenever a proprietary with a net value over $50,000 is to be liquidated, sold, or otherwise disposed of, the FBI, as much in advance as the Director or his designee shall determine is practicable, shall report the circumstances to the Attorney General and the Comptroller General. The proceeds of the liquidation, sale, or other disposition, after obligations are met, shall be deposited in the Treasury of the United States as receipts.

RESERVATION

These guidelines on the use of undercover operations are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

Benjamin R. Civiletti

Benjamin R. Civiletti
Attorney General

Date: 12/31/80

DRUG ENFORCEMENT ADMINISTRATION DOMESTIC OPERATIONS GUIDELINES*

The following guidelines are intended to promote efficiency in the operations of the Drug Enforcement Administration (DEA) and to improve coordination between DEA and other branches of the Department of Justice. The imposition of any sanction for failure to comply with these guidelines remains exclusively within the jurisdiction of the Attorney General and the Administrator of DEA, and such other persons as they may designate.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

I. ENFORCEMENT ACTIVITIES

A. Objective

1. Enforcement activities are those procedures employed by DEA Special Agents intended to result in (1) the arrest, prosecution and incarceration of drug traffickers, (2) the disruption of illicit traffic, (3) the reduction of drug availability through seizure of drugs and equipment necessary for operation of drug networks, and (4) deterrent effects on other traffickers by discouraging continued or potential trafficking.

2. Enforcement activities shall be undertaken with the primary objectives of prosecuting individuals, or individuals acting in concert, who finance, control, or direct drug trafficking organizations, or of interdicting the flow of drugs from significant drug trafficking operations.

---

* As amended, December 20, 1979.

3. Enforcement activities of DEA include what are traditionally considered investigation activities and intelligence activities. For the purposes of these guidelines, investigation is defined as the process of gathering evidence primarily for the immediate purpose of initiating a criminal prosecution, or for the seizure of specific unlawful shipments of controlled substances. The term "investigation" as used in these guidelines is not intended to include investigations of "leads" originated by or furnished to DEA offices. For the purposes of these guidelines, intelligence is defined as information gathered in support of the mission of DEA which is not collected primarily for the immediate purpose of initiating a specific prosecution, but which may ultimately lead to prosecution of one or more individuals or the seizure of unlawful shipments of controlled substances.

4. DEA investigations often produce ancillary intelligence, and DEA intelligence activities often produce evidence useful in criminal prosecutions. Internal review mechanisms provided for by these guidelines are not intended to apply to sporadic intelligence activities; nor are such activities to be reported to the United States Attorneys as investigations under Section I.D. of these guidelines. On the other hand, the systematic gathering of information targeted on an individual or individuals, or on a drug trafficking operation, which continues for a period--and in a manner--typically associated with an investigation, shall be considered as an investigation within the meaning of Sections I.B., C., and I.D.(relating to consultation with United States Attorneys).

B. Initiating Enforcement Activities

1. Investigation may be initiated based on facts or information indicating possible violation of the Controlled Substances Act, or other laws within the investigative jurisdiction of the Drug Enforcement Administration.

2. Supervisory approval of anticipated enforcement activity, including undercover operations as defined in these guidelines, is required prior to any Special Agent, informant, or defendant-informant, undertaking action. In each investigation an initiation report will be prepared by the Special Agent setting out the initial basis, targets, and objectives for the investigation.

C. Review and Continuation of Enforcement Activities

1. All review and approval for continuation of enforcement activities as provided below shall be reflected in writing.

2. An Agent's immediate supervisor shall review each investigation at regular intervals designed to ensure timely oversight of the conduct of the investigation, including undercover operations, and progress toward meeting the objectives of enforcement activities. The supervisor should consider such developments in the investigation as changes in the targets or objectives, assignment of additional agent resources, approval of significant amounts for purchase of information or evidence, and review requirements provided elsewhere in these guidelines in setting the review schedule.

3. Investigations reviewed under I.C.(2) may continue:

(a) where there is a clear indication of a violation of law within DEA's investigative jurisdiction and additional investigation of the alleged violators is required; or

(b) in the absence of a clear indication of a violation of law, the Agent's immediate supervisor shall authorize continued investigation only if there is substantial reason to believe that the investigation may:

(1) In DEA-initiated cases, lead to the prosecution of one or more individuals who finance, control, or direct a drug trafficking organization, or to interdiction of the flow of drugs from a significant drug trafficking operation (e.g., seizing a major shipment or processing laboratory);

(2) In non-DEA-initiated cases, meet the objectives set by the Drug Enforcement Administration for such cases (e.g., State or local prosecution of locally significant drug law violators).

All decisions to continue investigations shall meet the objectives of enforcement activities, and investigations shall continue in accordance with other provisions of these guidelines.

4. If enforcement activity is discontinued pursuant to paragraph I.C.3 above, enforcement activity may be reinstituted at any time new information consistent with the standards of paragraph I.C.3 is received or developed.

5. SAIC's shall ensure that each investigation is reviewed at the second supervisory level or above on a regular basis, no more than 6 months after its initiation, and regular intervals (not to exceed 6 months) for as long as the investigation continues, and may authorize its continuation if the standards set forth in paragraph I.C.3.(a) or (b) are met.

6. Upon completion of a review under paragraph I.C.5, SAIC's shall report to DEA Headquarters each investigation authorized to continue under I.C.3 above, and shall set forth their reasons for continuing investigation.

7. SAIC's will be responsible for reporting to DEA Headquarters on all important intra- and interregional investigations which indicate

potential multiple prosecutions of important violators. DEA may impose additional review and reporting requirements consistent with these guidelines.

D. Coordination with United States Attorneys

The purpose of this section of the guidelines is to insure that United States Attorneys are advised of all major investigations for which they will have responsibility for prosecution. Consistent with the requirements provided in these guidelines, DEA shall insure that the United States Attorneys are fully advised of investigations on a timely basis, and each United States Attorney shall insure that these reporting requirements are implemented within his district.

1. The Drug Enforcement Administration shall insure, unless authorized to the contrary by the United States Attorney, that the appropriate United States Attorney is advised of all investigations as soon as it appears to the first-line supervisory DEA agent that there is probable cause to make an arrest, even though no arrest is in fact contemplated. In investigations where the subjects are believed to be part of a major drug trafficking organization, but probable cause to make an arrest has not yet been established, the notification of a pending investigation to the United States Attorney shall be made by DEA at such time as it is determined that the subjects are part of a major drug trafficking organization. Schedules for other reporting of "investigations," as defined in paragraphs I.A.3. and 4., shall be determined by the SAIC and the United States Attorney in each district, so that the United States Attorney is assured of timely knowledge of investigative activities. The United States Attorney shall be consulted, shall

assign an Assistant United States Attorney if appropriate, and shall be furnished progress reports of the investigation at regular intervals to assure appropriate participation by prosecuting officials.

2. Investigations required to be reported to a United States Attorney under paragraph I.D.1., which involve possible offenses prosecutable in more than one Federal judicial district shall be reported to the Department of Justice, and to the appropriate United States Attorneys. The Department shall be consulted and furnished progress reports on such investigations at regular intervals.

3. The United States Attorney in each Federal judicial district shall, consistent with Department of Justice guidance, determine policy regarding declinations and also the referral of prosecutions to State and local authorities.

4. The United States Attorney shall, except in exigent circumstances, be consulted prior to the arrest of a defendant and again immediately after the arrest. The United States Attorney shall be furnished a written report of the arrest no later than five (5) working days after the arrest. The provisions of this subparagraph shall not apply to arrest of defendants who will be prosecuted in State or local courts, provided that such referrals for State and local prosecution are within the policy determinations and procedures of the United States Attorney provided for in subparagraph 3. above.

5. In all cases of seizures without a search warrant, unless reported incident to an arrest, a report in writing shall be submitted to the United States Attorney not later than ten (10) working days after seizure.

6. DEA shall, with due regard for the time necessary to prepare for trial, advise the prosecuting United States Attorney of any compensation paid to, or other consideration furnished to, an informant or defendant-informant, as well as of any electronic surveillance relating to the case.

7. All relevant DEA case files and manuals will be available for review by U. S. Attorneys on request. The U. S. Attorney shall be responsible for insuring the security and confidentiality of materials furnished by DEA.

8. Department of Justice instructions to United States Attorneys relating to these guidelines will be provided to DEA.

II. SOURCES, INFORMANTS AND DEFENDANT-INFORMANTS

A. General

1. A "source of information" is a person or organization furnishing information without compensation on an occasional basis (e.g., an observer of an event, or a company employee who obtains relevant information in the normal course of his employment), or a person or organization in the business of furnishing information for a fee and receiving only its regular compensation for doing so (e.g., a credit bureau).

2. An "informant" is a person who, under the specific direction of a DEA Agent, with or without the expectation of payment or other valuable consideration, furnishes information regarding drug trafficking or performs other lawful services.

3. A "defendant-informant" is a person subject to arrest and prosecution for a Federal offense, or a defendant in a pending Federal or State case who, under the specific direction of a DEA Agent, with an expectation of payment or other valuable consideration, provides information regarding drug trafficking or performs other lawful services.

4. Any individual or organization may be a source of information. Restrictions placed on the use of informants and defendant-informants are not applicable to sources of information.

5. Informants, and defendant-informants are assets of DEA, and are not to be considered personal resources of individual Agents. At least two (2) DEA Agents should be in a position to contact an informant or defendant-informant, and whenever practicable two (2) DEA Agents shall be present at all contacts and interviews with informants and defendant-informants. Regular contacts shall be maintained with informants and defendant-informants. The first-level supervisor will be responsible for ensuring that contacts, and the information gained from them, under this guideline are documented on a regular and timely basis.

6. Informants, and defendant-informants shall be advised that they are cooperating with DEA, but are not agents or employees of DEA or the Federal government. They shall be advised that information they provide may be used in a criminal proceeding. They may be told that DEA will use all lawful means available to maintain the confidentiality of their identity. Except in extraordinary circumstances they should not be assured that they will never be required to testify or otherwise have their identity disclosed in a criminal proceeding. In extraordinary circumstances they may be given this assurance after approval of the SAIC, provided the United States Attorney shall be notified of any such assurance given to any individual having information relevant to a pending investigation in advance of prosecution proceedings, including grand jury proceedings.

B. Informants

1. Only individuals who are believed able to furnish reliable enforcement information or other lawful services, and who are believed able to maintain the confidentiality of DEA interests and activities, may be utilized as informants.

2. Except as provided in paragraph II.B.3, an Agent must obtain the approval of his immediate supervisor prior to utilizing any informant. The approving supervisor should review the relevant data, including the criminal record, of any potential informant and ascertain whether he is the subject of a pending DEA investigation before deciding whether to approve him as an informant. Before an individual is asked to render services, in addition to supplying information, a more extensive investigation and evaluation of the individual shall be conducted. However, DEA may use an informant temporarily without extensive investigation where a second-line supervisor determines that lack of sufficient time precludes such investigation.

3. Individuals in the following categories represent particular risks as informants, and their use for an initial ninety (90) days may be utilized only as authorized below:

(a) individuals who are less than eighteen (18) years of age, with the written consent of a parent or a legal guardian, when authorized by the SAIC;

(b) individuals on Federal or State probation or parole, with the consent of the agency supervising them, and complete documentation by DEA, when authorized by the SAIC;

(c) former drug-dependent persons, or drug-dependent persons participating in an established drug treatment program, when authorized by the SAIC;

(d) individuals with two (2) or more felony convictions, when authorized by the SAIC;

(e) individuals who have had a prior Federal or State conviction for a drug felony offense, when authorized by the SAIC;

(f) individuals who have previously been declared unreliable by DEA, or any of its predecessors, when authorized by the Assistant Administrator for Enforcement.

4. The use of an informant shall be reviewed at least every ninety (90) days by the appropriate second-line supervisor, or the higher official indicated in paragraph II.B.3., above. Use of the informant may be continued if it is determined, upon review of his background and performance, that he is qualified to serve in this capacity as provided in paragraph II.B.1., above, and that he has the potential for furnishing information or services which it is believed will lead to the prosecution of one or more individuals who finance, control, or direct a drug trafficking organization or the interdiction of significant drug traffic. The SAIC shall be responsible for review of the utilization of each informant at least every 6 months, and continued use of an informant shall be authorized if it is determined that he meets these standards. The SAIC shall be responsible for reporting all such decisions to DEA Headquarters.

5. Informants may be paid money or afforded other lawful consideration. All funds paid to informants shall be accounted for, and specific records shall be maintained of any non-monetary consideration furnished informants.

C. Defendant-Informants

The purpose of this section of the guidelines is to insure that defendant-informants provide information or render services in a manner that recognizes their status as individuals subject to legal sanctions for criminal violations. In addition to the requirements provided in paragraph II.B, use of defendant-informants is governed by the following guidelines.

1. Only individuals who are believed to be able to furnish reliable enforcement information or lawful services, and who are believed able to maintain the confidentiality of DEA interests and activities, may be used as defendant-informants.

2. In addition to the steps necessary to utilize an informant which are set forth in paragraph II B, the approval of the appropriate United States Attorney or other prosecutor shall be obtained prior to seeking the cooperation of or utilizing a defendant-informant. The United States Attorney or other prosecutor shall be informed on a continuing basis of such cooperation or use of a defendant-informant.

3. An individual approved as a defendant-informant may be advised that his cooperation will be brought to the attention of the appropriate United States Attorney, or other prosecutor, and the substance and circumstances of giving such advice shall be documented in writing. The United States Attorney has the sole authority to determine whether a defendant-informant will be prosecuted, and DEA Agents shall make no representations concerning such prosecution. DEA Agents shall make no other representations or recommendations without the express written approval of the SAIC.

4. The SAIC shall obtain the written approval of the Assistant Administrator for Enforcement prior to recommending dismissal of any criminal matter. The SAIC shall inform DEA Headquarters of any other information concerning a defendant-informant's cooperation, or advice offered regarding disposition of a case, or imposition of a penalty.

5. Use of defendant-informants shall be reviewed in the manner prescribed for other informants in paragraph II.B above, and their use may be continued only if they are found to meet the standards set forth therein.

D. Knowledge of Criminal Activity by Informants and Defendant-Informants

1. DEA shall instruct all informants and defendant-informants that they shall not violate criminal law in furtherance of gathering information or providing other services for DEA, and that any evidence of such violation will be reported to the concerned law enforcement authority.

2. Whenever DEA has reason to believe that a serious criminal offense outside its investigative jurisdiction is being or will be committed, it shall immediately disseminate all relevant information to the appropriate law enforcement agency.

3. Whenever DEA has reason to believe that an informant or defendant-informant has committed a serious criminal offense the appropriate law enforcement agency shall be advised by DEA, and the appropriate United States Attorney shall be notified.

4. In disseminating information in accordance with paragraphs D.2 and 3 above, all available information shall be promptly furnished to the appropriate law enforcement agency unless such action would jeopardize an ongoing major investigation or endanger the life of a DEA Agent, informant

or defendant-informant. If full disclosure is not made for the reasons indicated, then limited disclosure shall be made by DEA to the appropriate authorities, to an extent sufficient to apprise them of the specific crime or crimes that are believed to have been committed. Full disclosure shall be made as soon as the need for the restrictions on dissemination are no longer present. Where complete dissemination cannot immediately be made to the appropriate law enforcement agency, DEA shall preserve all evidence of the violation for possible future use by the appropriate prosecuting authority. Nothing herein shall prevent full and immediate disclosure to the appropriate law enforcement agency if in DEA's judgment such action is necessary even though an investigation might thereby be jeopardized.

5. If DEA desires to continue making use of an informant or defendant-informant after it has reason to believe that he has committed a serious criminal offense, DEA shall advise the appropriate United States Attorney and a determination shall be made by him after consultation with the Chief of the Narcotic and Dangerous Drug Section, of the Criminal Division of the Department of Justice, whether continued use should be made of the individual by DEA.

III. UNDERCOVER OPERATIONS

A. Undercover operations involve DEA Agents who assume a fictitious identity or role on a temporary basis (often posing as individuals involved in drug trafficking), and/or the use of informants or defendant-informants under the direction of DEA, to obtain evidence or other information relating to violations of the Controlled Substances Act or other drug laws.

B. Undercover operations conducted by DEA may include employment of a ruse or deception, the provision of a facility or an opportunity for commission of an offense, or the failure to foreclose such an opportunity, or mere solicitation that would not induce an ordinary, law-abiding person to commit an offense.

C. Undercover operations may be authorized where there is reason to believe use of this technique may result in evidence or information concerning significant drug trafficking activities. Undercover operations must be authorized by a group supervisor or Resident Agent-in-Charge. Such authorization must be written; however, in exigent circumstances documentation may be prepared after the undercover operation has been initiated provided oral authorization has first been obtained. Authorizations for undercover operations shall set forth a description of the undercover operation, and enforcement objectives to be met by the undercover operation, and the provisions made for the protection of undercover Agents or informants.

D. DEA may furnish an item necessary to the commission of an offense other than a controlled substance (i.e., a legal chemical essential to drug production), or may furnish services in furtherance of illegal drug trafficking which are difficult to obtain (i.e., sophisticated chemical expertise), upon the authorization of the SAIC, after consultation with the appropriate United States Attorney and with DEA Headquarters. Activity such as furnishing a non-controlled substance, or other services, may be authorized when there is strong reason to believe such activity will lead to the prosecution of one or more individuals who finance, control, or direct a drug trafficking organization, or to the interdiction of the flow of drugs from a significant drug trafficking operation.

E. Undercover operations shall not include the furnishing of a controlled substance except in extraordinary cases after consultation with the appropriate United States Attorney, when the Administrator of DEA determines that there is reason to believe such activity will lead to the prosecution of one or more individuals who finance, control, or direct a drug trafficking organization, or to the interdiction of the flow of drugs from a significant drug trafficking operation. In making such determinations the Administrator of DEA shall take into account the type and amount of drug involved; its likelihood of reaching consumers; the number and position in the drug trafficking organization of subjects who have, and who have not, been sufficiently identified to be arrested; the type and amount of evidence necessary to complete the investigation; the time required to attempt to do so; and the likelihood of obtaining such evidence.

F. SAICs shall advise DEA Headquarters immediately if specific information is developed, in the course of an undercover operation or otherwise, regarding the shipment, delivery, or location of substantial amounts of controlled substances. In certain cases it may be appropriate not to seize such drugs in order to enhance the effectiveness of an investigation. DEA may continue an investigation without seizing substantial amounts of illicit drugs only when:

1. Authorized by the Assistant Administrator for Enforcement of DEA or his Headquarters designee. The Assistant Administrator for Enforcement shall consider the factors set forth in paragraph IIIE above, and may authorize the investigation to continue without seizure of the drugs in question if he makes the determination set forth therein. His decision shall be reflected in writing.

2. Where immediate seizure of substantial amounts of controlled substances might result in compromise of an investigation of greater significance than seizure would warrant, or in the death or serious injury to a DEA Agent, informant, or defendant-informant, an immediate decision may be made by the field Agent or his supervisor, consistent with the safety of the Agent, informant or defendant-informant. In such instances the Assistant Administrator for Enforcement shall be promptly notified.

G. While it is recognized that there is an inherent risk of violence in drug trafficking, undercover operations shall not include originating, encouraging, or planning to participate in violent activity. If in the course of an undercover operation there is a prospect of previously unanticipated violence, the Agent, informant, or defendant-informant involved shall make every effort consistent with his personal safety to prevent such violent activity and, to the extent he is not completely successful, to minimize the degree of violence and to avoid participation in it.

H. In conducting undercover operations DEA Special Agents, informants, and defendant-informants shall not attend meetings between defendants and their counsel if attendance can be avoided. If attendance cannot be avoided they shall not report anything they may overhear while present at meetings with counsel, unless they observe the commission of a crime.

I. Informants and defendant-informants used in undercover operations, shall be advised of the standards established by these guidelines relevant to the activities they are asked to undertake on behalf of DEA, and the substance and circumstances of giving such advice shall be documented in writing.

IV. ELECTRONIC SURVEILLANCE AND RELATED TECHNIQUE

Electronic surveillance and related techniques may be employed as follows:

A. Interception of wire or oral communications through the use of any electronic, mechanical or other device ("wiretaps" or "bugs") in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the related Department of Justice instructions.

B. Recording telephone numbers and related information (but not conversations) by the use of "pen registers," "touch tone decoders," and other devices pursuant to a Federal court order in the nature of a warrant issued under Rule 41 of the Federal Rules of Criminal Procedure.

C. Electronic tracking devices ("beepers") and transponders when authorized by a Group Supervisor or higher authority, and pursuant to a Federal court order in the nature of a warrant of the type issued under Rule 41 of the Rules of Criminal Procedure if installation involves a trespass or if otherwise required by the Federal case law in the judicial district or districts involved.

D. Telephone and transmitters to monitor private conversations with the consent of a party to the conversation pursuant to the provisions of the Attorney General's "Memorandum to the Heads of Executive Departments and Agencies," dated October 16, 1972.

E. Photographic, optical (e.g., binoculars), electro-optical (e.g., night vision equipment), and television equipment as surveillance aids or for recording evidence, pursuant to the provisions of the DEA Agents Manual.

F. Electronic, magnetic, vibration sensors, and radar equipment to detect the movement of persons, vehicles, vessels, and aircraft pursuant to the provisions of the DEA Agents Manual.

G. No other form of electronic surveillance or related technique may be utilized.

UNDERCOVER GUIDELINES

U.S. Immigration and
Naturalization Service

TABLE OF CONTENTS

CHAPTER PAGE

CHAPTER I:

INTRODUCTION

Undercover - An Investigative Technique 1
Use of Undercover Techniques 1
Agency Approval 2
Undercover Objectives 2
Entrapment 3

CHAPTER II:

GENERAL QUALIFICATIONS OF THE UNDERCOVER INVESTIGATOR

Willingness 4
Self-Confidence 4
Initiative and Judgement 4
Temperament 4
Adaptability 5
Patience 5
Courage and Tenacity 5
Observation and Memory 5
Physical Stamina 5
Knowledge of the Criminal Element 6
Physical Appearance 6
Ability to Live the Role 6
Technical Skills 6
Additional Qualification 7

CHAPTER III:

THE PRELIMINARY INVESTIGATION

Determine the Objective 8
Analyze the Assignment 8
Select the Approach 8
Study the Suspect 9
Geographical Area 10

CHAPTER IV:

ESTABLISHING UNDERCOVER IDENTITY

The Assumed Identity 11
Documenting the Undercover Identity 11
Cover Story 11
Disclosure of Identity 12

CHAPTER V:

CONTACT WITH THE SUSPECT

Approaching the Suspect 13
Use of Informants 13
The Chance Encounter 15
Luring 15
Gaining the Suspect's Confidence 16
Developing Information from the Suspect 17
Participation in a Criminal Violation 17
Greed 17
Contact with the Backup Unit 17
Contact within a Building 18

CHAPTER VI:

SUPPORT SURVEILLANCE

Support Requirements 19
Communication with the Cover Team 19

CHAPTER VII:

PRECAUTIONS AND POSSIBLE PITFALLS

Women 20
Drinking 20
Narcotics 21
Use of Government Owned Vehicles 21
Credentials and Firearms 21
Personal Misconduct 21

CHAPTER VIII:

BUY/ORGANIZATIONAL INFILTRATION OPERATIONS

Controlled Informant Buy 22
Buy/Bust Technique 23
Walk-Away Buy 23
Number of Buys 23
Arrangements for Contacts/Buys 24

CHAPTER IX:

CLOSING THE INVESTIGATION

Timing 24
Court Testimony 25
Conclusion 25

CHAPTER 1

INTRODUCTION

1. Undercover - An Investigative Technique

The use of an undercover operation as an investigative technique requires extensive training, planning, preparation and handling. Unlike most criminal offenses, the sale of documents, illegal aliens or the infiltration of smuggling organizations as drivers, drop house operators, etc., typically occurs between two individuals, neither of whom could realistically be classified as a "victim". Hence, in this type of crimimal investigative activity there is no complaint report nor complaintant to interview or to give court testimony. Confessions or admissions from the participants in those incidents are not obtained until after undercover negotiations and deliveries have been made, if then. Illicit transactions typically are conducted under the most private circumstances. For these reasons, the criminal investigator must rely on undercover work to infiltrate criminal organizations; in order to establish overt acts or to make undercover buys; which will lead to the arrest of the violator.

Of all enforcement assignments, probably the one that is least understood is that of the undercover investigator. Many people visualize this role as similar to the super spies characterized in the movies. Others see the undercover officer as a self sacrificing individual who cuts himself off from his family and friends for extended periods of time so that he can live within the criminal element until the completion of his assigned investigation. Both of these views are somewhat extreme and unrealistic. While undercover assignments are hazardous and require extensive preparation and training, the actual contact with the violator and his associates are usually minimal. Most investigative undercover assignments require establishing a contact through informants, in order to facilitate the infiltration of the criminal organization; making a buy of documents or aliens; and then the arrest of the violator.

Most investigative undercover assignments generally requires the following elements to effect the arrest

(1) Establishing a contact
(2) Development of informants
(3) Infiltration of the criminal organization
(4) Surveillance support assistance
(5) Purchase of fraudulent documents or illegal entrant aliens

The investigator in an undercover role will be faced with certain problems generally not encountered in other enforcement activity with complications presenting exacting and nerve-wracking demands. The individual acting in an undercover capacity must overcome these demands by his resourcefulness, intelligence, initiative, energy and courage.

2. Use of Undercover Techniques

When a targeted violator effectively conceals his association with a criminal activity so well that only an investigator on the "inside" can develope sufficient evidence for a prosecutable case, then a determination may be made to use an undercover approach. In many instances the undercover effort may substantially reduce the time and expense which would be required to achieve the same results through the utilization of other enforcement techniques.

Undercover techniques may be used under the following circumstances:

(1) Where information or evidence cannot be readily obtained in an open investigation;

(2) When an open investigation or when regular investigative techniques have proven unsuccessful;

(3) When indications are, an undercover operation will reduce time and expense involved in the completion of the investigation.

It should also be pointed out that the improper utilization of an undercover operation can prove to be expensive in both manpower and money. Before the decision is made to initiate this technique, there are certain primary factors to be considered. These factors are:

(1) The extent of the criminal activity and the results that will be achieved;

(2) Is time a limiting element;

(3) The complexity of the preparation involved;

(4) The difficulty to be incurred in infiltration.

3. Agency Approval

Authorization from the United States Attorney and District Director or Chief Patrol Agent must be obtained prior to conducting undercover investigations. It should be remembered that successful undercover investigations are the result of a team effort with the undercover officer being part of the team. The undercover officer should fully understand the objective of the particular investigation.

Prior Regional and Central Office approval is necessary before conducting undercover operations in foreign countries.

4. Undercover Objectives

The general objective of an undercover investigation is the obtaining of evidence to successfully sustain a criminal prosecution. The following objectives encompass most of the situations in which undercover techniques may be utilized:

(a) Obtain information and intelligence.

(b) Obtain evidence of overt acts of a criminal violation.

(c) Determination if a criminal violation is being planned or committed.

(d) Identify principals involved in criminal activity.

(e) Prove association between conspirators.

(f) Identify witnesses.

(g) Check reliability of informants.

(h) Determine most advantageous time to make arrests or execute search warrants.

The investigator who utilizes the undercover approach will find that through execution of these techniques, he will achieve results as accurate and reliable as any other investigative technique. However, if careful preparation is disregarded, it is likely that the objectives sought through undercover activities will not be accomplished and the identity of the undercover investigator could be compromised.

5. Entrapment

Entrapment is a legal defense raised by the defendant when he claims that, but for the inducement of government investigators, he would not have committed the crime. This defense is most likely to be raised in situations involving informants and investigators working undercover. The undercover investigator must have a knowledge of the law regarding entrapment. Entrapment is defined as the acts of officers of the government in inducing a person to commit a crime not contemplated by him in order to initiate a criminal investigation.

Chapter II

GENERAL QUALIFICATIONS OF THE UNDERCOVER INVESTIGATOR (MALE/FEMALE)

1. Willingness

The primary qualification of an undercover investigator, as in any other line of employment, is willingness to do the investigation. The degree of success the undercover assignment receives will be directly reflected by the willingness of the investigator. An undercover investigator must desire to accomplish his mission, regardless of personal considerations This can and will involve the investigator's ability and willingness to subordinate normal courtesies, personal desires and conventional standards to the requirements of the investigation.

2. Self-Confidence

To be a successful undercover investigator, the individual must maintain self-confidence in himself. In order to have this confidence, he must know the laws he is enforcing, limitations imposed and methods he may employ. The investigator must know that he can play the role and play it well. A lack of confidence in his role playing can only result in the violator discovering his identity. Self-confidence should never be equated to investigator conceitedness, rather to the fact that he has prepared himself with all the requisites to successfully assume the role he must play. Further, the investigator's confidence increases directly as his experience with violators broadens.

3. Initiative and Judgement

An undercover investigator must use every minute of time to his best advantage, constantly directing his thinking toward the overall objectives. The investigator is expected to analyze everything he sees and hears. The undercover investigator must be self-reliant and able to initiate action based on sound judgement. Instructions given the investigator by superiors will usually be limited to a statement of general policy and desired objectives. The investigator must be capable of making decisions and acting on them without the benefit of official advice. Further, the investigator will assume responsibility for the decisions he makes. Finally, the investigator must speculate on what is going to happen.

4. Temperament

The successful undercover investigator will possess a calm, affable and enduring personality. In his role, the investigator will have to operate under hazardous conditions in the presence of criminals without any visible emotions being displayed. The undercover investigator must be able to recognize and control emotions such as fear, anger, disgust or surprise when such a display of emotions would bring him to the attention of the violator. The undercover investigator should be able to portray to the violator emotions other than the ones he truly feels at the moment.

5. Adaptability

The investigator engaging in undercover work must be able to take advantage of suddenly changing conditions and situations and be able to think clearly and quickly to meet these sudden emergencies. Due to rapid changes in undercover situations, adaptability is often the only key to survival. Ingenuity is a necessity if the undercover investigator is to be able to adjust and conform to a particular situation.

6. Patience

As in the techniques employed in surveillance, patience is a quality necessary where the undercover approach is to be used. The investigator must not attempt to force the subject to do business any faster than the subject himself desires. Efforts or overt actions to speed the criminal activity might well result in the discovery of the undercover investigator or at least cause the violator to become concerned about these efforts. The violator quite often maintains a standard routine in his dealings which he will carry out to the fullest before completing any negotiations. Therefore, patience must be predominate in all activities with the violator.

7. Courage and Tenacity

The undercover investigator must possess the qualities of courage and tenacity, both of which run hand in hand. Courage, simply stated, is the ability to meet danger and difficulties with firmness. Tenacity is the quality that keeps one going in the face of danger and seemingly insurmountable obstacles. It is further characterized by an unwillingness to let stress and strains deter the undercover investigator from accomplishing his mission.

8. Observation and Memory

Observation of an incident is more than merely seeing it occur. Observation is being able to accurately describe the person, place, or thing seen. Being able to accurately describe a happening directly reflects on an individual's memory. A good memory requires and individual to be able to recall events in their proper sequence. Not only is a good memory necessary for compiling an accurate record, it is also vital in recalling the events from the witness stand. Not every person has the same degree of proficiency in mentally noting the occurrences around him. If the investigator has doubts about his memory or powers of observation, he should not wait until he has been given an undercover assignment to start developing these talents.

9. Physical Stamina

An undercover investigation may involve a continuous, 24-hour a day, working situation for the undercover investigator. The undercover investigator will be called upon to endure long periods of mental and physical strength without adequate food, rest or relaxation. These stresses and strains should not be allowed to deter him from accomplishing his mission. Good physical conditioning will enhance his self-confidence, increase his energy, maintain his physical capabilities, and keep his mind alert.

10. Knowledge of the Criminal Element

Knowledge of the criminal element is essential to the undercover investigator. Without this, he would noot be able to meet the violator on his own terms. Associating with the criminal element dictates that the undercover investigator display the same know-how, ideas, background, language and slang as that displayed by the violator. The undercover investigator must further have a thorough understanding of the way the violator plans and carries out his criminal activities. The undercover investigator has to understand that the violator is suspicious in nature and uses extreme caution during his activities. The undercover investigator should display the same degree of caution as the suspect. In addition, moral standards of the criminal element are entirely different from those to which the investigator is accustomed. The investigator should be prepared to counter any efforts which would place him in a compromising situation. Correct evaluation of events which might otherwise be misjudged can depend entirely on the investigator's knowledge of the violator.

11. Physical Appearance

The physical appearance of the undercover investigator is not of great importance unless it provides a clue to his true identity as an investigator or is inconsistent with his background story. In other words, consideration should be given to the type role the investigator is to play. If the undercover investigator poses as a laborer, then he should have the physical appearance of a laborer, displayed by good muscles, calloused hands and, possibly a ruddy complexion.

In areas where there is a particular ethnic influence, it is better to employ the use of an investigator with a similar background as the people with whom he will try to do business.

12. Ability to Live the Role

In assuming an undercover role, the investigator will have to display a high degree of dramatic skill. The undercover investigator will actually adopt the characteristics, such as likes and dislikes, living standards, methods, attitude, psychology and other peculiarities which make up the nature of the violator. Living the role requires continued alertness and concentration to maintain an assumed identity for long periods of time. The success of the investigation and the life of the undercover investigator may well depend on his overall acting ability.

13. Technical Skills

Effective corroboration of an undercover investigator's activities and statements can depend heavily on his familiarity and skill in the use of various technical equipment which is at his disposal. For this reason, it is necessary that the undercover investigator establish a thorough knowledge of the technical equipment he chooses to use.

For example, should the undercover investigator wish to obtain photographs of the suspects, equipment or contraband by using a 35mm or miniature camera, he will find it necessary to become proficient in their use in order to obtain satisfactory results. This will require a knowledge of light, film speed, aperture settings and shutter speeds.

An additional consideration in technical equipment might be the use of miniature recording and monitoring devices by the undercover investigator. This equipment is used foremost for the protection of the undercover investigator. It allows the covering investigators to monitor the undercover investigator's activities and movements. Prior to using this type of equipment, the undercover investigator must be familiar with Agency and legal guidelines which will dictate how they are to be used.

Service

At times, the skills required of the undercover investigator may include the ability to operate unfamiliar vehicles and equipment. This could be especially true if it is determined at the beginning of the investigation that the suspect is using such equipment.

CHAPTER III

THE PRELIMINARY INVESTIGATION

1. Determine the Objective

The undercover investigator must have a thorough understanding of the overall objective to be reached as a result of his assignment. The undercover investigator's objective, for example, may be to secure court evidence against one suspect or against a group of suspects. If the investigator is working in an extended or penetration type operation most often he will have his objectives determined and explained by a case agent who is directing the investigation.

2. Analyze the Assignment

In preparing for the assignment, the undercover investigator should analyze the situation with a view toward:

1. Selecting his assumed identity.
2. Determining the background story.
3. Establishing a means of communication.
4. Gaining knowledge of the violator.
5. Obtaining information concerning local situations.
6. Reports.

In essence, this is the time that the undercover investigator will be preparing for his role and planning to meet his overall objectives.

3. Select the Approach

The objective of the undercover investigation will generally dictate the type of approach to be used by the undercover investigator. If the objective is an individual, the investigator will have to be accepted by the suspect. This can be accomplished through the use of an informant, or by the undercover investigator becoming acquainted in the places that are frequented by the suspect.

If the objective is a group of people, the undercover investigator will have to determine how he can join them. Once again, the use of an informant will probably be a necessity. However, the investigator may again consider frequenting establishments used by the violators and establishing himself with them. A determination may also be made to gain the confidence of unwitting informants who are familiar with members of the group, and subsequently obtaining an introduction.

Anyone, or combination of these approaches, may be used in most undercover situations. Whether the suspect accepts the investigator or not is dependent upon the investigator's ability in his role.

4. Study the Suspect

Unless the undercover investigator has a thorough knowledge of his subject, he will find himself frequently at a disadvantage. The investigator should, as a first step in his preparation, draw up a checklist of the details of the subject's character and history. The following is a list of some of the information about the suspect which the investigator should be familiar with prior to his entering the undercover role.

1. Name - Full name, aliases and nicknames. Also, titles in relation to a job or public office which the suspect may hold.
2. Addresses - Past and present; residential and business.
3. Description - This should include not only the basic description of the individual but any unusual traits and peculiarities as well. A photograph of the suspect should also be obtained.
4. Family and Relatives - This will assist the undercover investigator in his overall knowledge of the suspect.
5. Associates - This knowledge is essential to an understanding of the subject's activities and the establishment of a conspiracy violation.
6. Character and Temperament - The strength and weaknesses of the subject should be known. Likes, dislikes and prejudices are particularily helpful.
7. Vices - Drug addiction, alcohol or gambling.
8. Hobbies - This knowledge could give you the undercover investigator a simple way of developing an acquaintance with the suspect. A common interest of this nature can cause a strong bond between the investigator and the suspect.
9. Occupation and Specialty - These, again, will allow the undercover investigator to establish a possible meeting ground with the subject. These are also indicative of the character of the subject.
10. Propensity for Violence - Information received from informants, background information from past arrest records and personal observations by the undercover investigator will help identify a subject's possible violent nature. The undercover investigator should make every attempt to know a subject's propensity for violence.

It should be pointed out to the undercover investigator that it will not always be possible to gather complete background information on the subject of the investigation. Some of the previously discussed information may not be readily available prior to entering into the undercover role. However, the more background information the investigator can assemble concerning the subject, the better equipped he will be to handle the assignment.

5. Geographical Area

The undercover investigator should become familiar with the geographic area he will be working. This can be accomplished by either surveillance, reconnaissance or knowledge obtained from officers familiar with the area. A determination should be made as to the type of people in the area, i.e., blue or white collar workers, immigrants, ethnic groups, professional or upper class members of society. When these facts are ascertained, appropriate dress, conduct, speech, and activities within that area can be determined.

CHAPTER IV

ESTABLISHING UNDERCOVER IDENTITY

1. The Assumed Identity

A fictitious background and history for the new character of the undercover investigator should be prepared. The investigator's background story should seldom, if ever, be wholly fictitious. The undercover investigator should assume an identity in keeping with his personality traits and in keeping with his own background and characteristics. It is important that the undercover investigator does not assume an identity which would make him conspicuous or draw attention to him. Usually, the duration of an undercover assignment cannot be predicted, which dictates that the identity selected be such that it can be maintained for a long period of time.

The fictitious name that the undercover investigator selects should be such that he can easily remember, respond to and recognize. It is recommended that the undercover investigator use his true first name and a similar, but fictitious, surname. Using a surname which is a variation of, or similar to, the undercover investigator's true name can assist him in his memory and response.

2. Documenting the Undercover Identity

The undercover investigator cannot be sent into the investigation using an assumed identity without proper documentation of such identity. This documentation should include all documents, official and personal, needed by the undercover investigator to verify his background story. The following are some of the official documents which may be obtained in an assumed name by the undercover investigator:

1. Driver's license.
2. Automobile or vehicle registration.
3. Birth certificate.
4. Social Security Card.
5. Alien Registration Card.

Control of this personal documentation should be maintained by a District Director or Chief Patrol Agent.

3. THE COVER STORY

The cover story that is used by the undercover investigator should be such that is offers something attractive to the suspect. For example, the undercover officer might tell the violator that he, the officer, needs documents for his illegal aliens, needs documents for himself, needs aliens for his business or is willing to take the risk to transport illegal aliens for the easy money. Effective gathering of intelligence on the suspect is important in determining what "activities" are attractive to the violator. The investigator must do everything he can to make the story believable. He must anticipate questions that may be asked so that he may formulate answers in advance.

The undercover officer must abandon his official identity by removing his badge and all credentials, cards, letters, notebooks and all other items that might cause suspicion or which might conflict with his cover story. Some personal items may actually verify his cover. For example, if the undercover officer uses his real name in an undercover buy, he may want to keep his credit cards or identification bracelet as "verification" of his identity.

The fictitious role that is assumed by the undercover officer should allow compatibility with both the suspect and neighborhood involved. A good background story should include names, addresses, and descriptions of assumed places of employment, associates, and neighborhoods. The fictitious information should be of such a nature that it cannot be easily checked by the suspect. The background city should be one with which the officer is familiar but, if possible, not known to the suspect.

Personal possessions such as clothes, wallets, rings and watches, and the amount of money carried should be appropriate to the chosen character. Clothes and method of dress should conform to appropriate standards expected by the violator.

In summary, the undercover officer must build a background story in which he can be comfortable. The investigator, in essence, must be able to say to himself, "I am this other person."

In most undercover investigations, the investigator should make provisions in his background story for the following:

1. Frequent contact with the subject.
2. Freedom of movement and justificatons for actions.
3. A background that will permit the investigator to maintain a financial and social status equivalent to that of the subject.
4. Mutual points of interest between undercover investigator and subject.
5. Means of communication to other investigators.
6. An alternate story which can be used in the event that the original story becomes compromised.
7. A background which will include a previous address that the investigator can speak intelligently of.
8. An allowance for deficiencies in the undercover investigator's role, such as language or particular skills.
9. A method and reason for leaving the area if it should become necessary.

4. Disclosure of Identity

The undercover investigator must know whether to disclose his identity or remain undercover if arrested by other authorities. A plan or act should also be prepared against the contingency of accidental disclosure of identity.

CONTACT WITH THE SUSPECT

1. Approaching the Suspect

As the undercover assignment becomes operational, either the investigator will use an informer, witting or unwitting, to reach the suspect, or be prepared to spend an extended period of time in establishing a relationship between himself and the subject of the investigation.

The approach used in the first contact with the subject is, in most instances, the most critical point in the investigation. If this is accomplished smoothly and naturally, it should tend to offset any suspicion the subject may have and facilitate the establishment of a continuous association with him.

2. Use of Informants

A witting informant is an informant who furnishes information to an investigator, knowing full well his capacity as an investigator. The witting informant may also agree to accompany the undercover investigator in an initial contact with the subject of an investigation, utilizing his association with the subject to effect an entree for the investigator. This approach is the quickest, surest way to establish contact. The degree of success, however, is contingent on the amount of confidence the suspect has in the informant and the informant's reliability.

Every informer has his own personal reason for assisting investigators. The undercover investigator, for his own safety and the success of the assignment, should know the informer's reason and as much as possible about the informer before any contact is made. Some informants would like to be law enforcement officers; some might need money; some are angry with the subject of the investigation; and others are just plain crackpots. If the informer is angry with the subject, the subject usually knows it, therefore, making the informant ineffective. A reconciliation could occur during the assignment resulting in the possibility of the informant exposing the undercover investigator's true identity to the suspect. The crackpot may decide to tell the suspect about the undercover investigator while under a sudden complusion to do so. These are but a few examples to emphasize the importance of knowing the informant's motive.

Probably the best witting informant is one who is supplying information for money. If the informant has the confidence of the subject and is furnished the necessary motivation to want to succeed, the undercover investigator stands a much better chance of reaching his objective.

The witting informant will help establish an entree for the investigator, but from then on it is the investigator's responsibility to make the case. A suspect may suddenly desire to know something about the undercover investigator even after the informant has introduced and vouched for him. The investigation may fall flat on its face at this point, if the investigator has depended entirely on the informant to perfect his entree and is not prepared with a well substantiated background story.

The undercover investigator should be careful to ascertain and evaluate any animosity or mistrust between the informant and the suspect. It may be sufficiently intense to necessitate a complete change in plans. Questions which might arise or be asked by the suspect should be anticipated and answers rehearsed between the investigator and the informant. A story answering where and how they met, how long they have known each other, how long and what kind of association they have, and any other questions which might arise under particular circumstances, should be determined and settled beforehand.

Time, effort and money are saved through the use of the witting informer in making contact with the suspect. Additionally, the investigator receives a direct contact with the wanted suspect and the possibility of another witness to a violation. However, some dangers which exist in using a witting informant are:

1. Danger of a double-cross.
2. Actions of an informer under pressure cannot be predetermined.
3. The informer acquires knowledge of the entire operation; the undercover investigator; and undercover techniques.
4. The investigation may be prolonged by the informant in an effort to obtain more money.
5. The informant may cheat on expenses.
6. The possibility that the informant may participate in other crimes and when caught, compromise the investigation by using his employment status with the government as a lever to extricate himself.

The undercover investigator must control the informer. It must be accomplished to the point that:

1. The informer does not compromise the investigation by his indiscreet actions.
2. The informer receives a payment of reward only after completing a successful performance.
3. The undercover investigator dominates the undercover activity.
4. The informer does not receive information concerning other current investigations.

Controlling and handling an informer is sometimes one of the hardest parts of the undercover assignment. Before attempting the initial contact with the suspect the informer must be made aware of his role and guidelines he is to adhere to during the investigation. If the assignment indicates that the informant is to participate in a criminal violation, the undercover investigator must clear it through a supervisor and the United States Attorney's Office.

The undercover investigator should further assure himself that the informer is aware there is a possibility he will be called to testify in court. The investigator should further assure himself that the informer has an understanding of entrapment.

The unwitting informant is an unsuspecting individual, who does not know the true identity and purpose of the undercover investigator. This type of informer unknowingly aids the undercover investigator in establishing useful criminal contacts. This method of approach is usually more time consuming than the use of the witting informant. A chain of unwitting informants may have to be utilized by the undercover investigator before any contact is made with a major suspect. Once the investigator gains the confidence of the unwitting informant, the latter's performance in the presence of the suspect may surpass that of the witting informant who may be inhibited by the fear of discovery. When the investigator determines that an individual has a working relationship or acquaintance with the principal suspect, he should cultivate this individual's friendship. Generally, the investigator will find it easier to gain the confidence of a hireling than it is to be accepted by the principal suspect. Never assume that such a friendship is unimportant; the principal suspect may trust the unwitting informant's judgement. After confidence has been established, the unwitting informant may assist the investigator's entree with the suspect by supplementing the necessary background story. As with the witting informant, the unwitting informant will generally dominate the first contact with the suspect. The difference will be his ignorance of the investigator's true identity. The advantage of this approach is that the undercover investigator cannot be compromised by the unwitting informant's knowledge of the operation.

3. The Change Encounter

The change encounter between the undercover investigator and the suspect may occur on the spur of the moment or be a well planned maneuver, either of which would appear to the suspect as a natural chain of events. This type of meeting generally would cause little suspicion on the part of the suspect and provides the initial contact the undercover investigator needs. The way the undercover investigator conducts himself during a chance meeting with the suspect will determine his acceptance or rejection by the suspect.

4. Luring

Luring is the method by which the undercover investigator arouses the interest of the suspect to the extent that he will approach the investigator. This is characterized by the spreading of information that the undercover investigator has the capability and funds to engage in criminal activities. If this information is properly prepared and disseminated among the criminal element, it will eventually come to the attention of a principal suspect. Careful investigation must be made prior to any initial contact in order to determine the most effective lure.

5. GAINING THE SUSPECT'S CONFIDENCE

After the first contact, the undercover investigator is immediately faced with the problem of avoiding suspicion. The investigator will have to appear to be the suspect's friend and may have to participate in some of the suspect's activities, in which case the investigator must depend almost entirely upon his own judgement.

Usually the suspect's initial attitude will be suspicious and skeptical. The suspect may attempt to throw the investigator off balance by suddenly accusing him of being an investigator. This does not necessarily mean that the suspect is aware of the undercover investigator's true identity but only that he is trying to read the investigator's reaction or flush out a betrayer. The well prepared undercover investigator anticipates such an emergency and immediately puts the suspect on the defensive, possibly by using counter accusations.

The allay the suspect's suspicions and gain his confidence, the undercover investigator may use the following techniques:

1. Arrange to be arrested, questioned or searched by other enforcement officers, where the action can be observed by the suspect.

2. Pretend disgust or anger with the suspect for questioning him.

3. Appear as though he doesn't trust the suspect anymore than the suspect trusts him.

4. Anticipate a trap when questioned regarding his knowledge of a person, location of a street, or anything else which may be fictitious.

   Trap plays may include information about violations to see whether the information is passed onto other enforcement officers.

5. Use the same degree of caution under the particular circumstances as the suspect does.

6. Assume the suspect is intelligent. Do not underestimate the suspect. He is cunning and educated in his specialty.

7. Maintain his role when not in the presence of the suspect.

8. Leave the impression with the suspect that he can depend on the undercover investigator any time and can rely on what he says.

9. Never overplay the undercover role or give too many explanations, but act naturally at all times.

6. DEVELOPING INFORMATION FROM THE SUSPECT

The undercover investigator must listen. If he does all the talking or takes the lead in conversations, the suspect will not have the opportunity to talk. Occasionally, the investigator may have to initiate a conversation, especially about criminal activity. In this instance, the investigator should talk about activities other than those he is currently investigating, and eventually guide the conversation towards his real interest.

The undercover investigator, by listening, should learn everything possible about the suspect, his counterparts in the criminal activity, with whom the suspect does business, and from whom he receives instructions or orders. If the suspect is in a position to have information about higher echelons in the criminal organization, the undercover investigator should attempt to have the suspect introduce him to persons in the higher level of authority. This requires the utmost persistence and resourcefulness on the part of the undercover investigator.

7. PARTICIPATION IN A CRIMINAL VIOLATION

In most undercover cases, it will be necessary for the undercover investigator to participate, to some extent, in the violation of certain laws. Before entering into the illegal activity, the investigator should have the approval of his superiors and the United States Attorney's Office. Permission to engage in the crime under his immediate investigative jurisdiction will not excuse the investigator for participating in other crimes; and, if other crimes are committed, the investigator can be subject to the penalties provided by law for any such offense.

Under no circumstances will an undercover investigator be permitted to engage in "malum in se" crimes, such as murder, robbery, arson, etc.

8. GREED

It may be expedient or necessary in some instances for the officer to avoid contact with the suspect for a few days. He may do this by pretending to be going out of town for a given period. The thought that an investigator must keep foremost in his mind is that the violator is not only suspicious of everyone, but he is probably just as clever as the officer. The biggest factor working against the violator is greed. Greed makes many violators sell to agents even though he may suspect that the buyer is an officer.

9. CONTACT WITH THE BACKUP UNIT

The value of sound intelligence notwithstanding, quite often the officer and his backup team will have to work in a fluid situation with minimum advance information. In these instances, time limits should be established. If the officer does not emerge or give a prearranged signal to indicate that he is all right, the backup squad will quickly enter and locate the undercover officer. Furthermore, there should be guidelines established for those situations where the suspect sets unexpected stipulations. The officer should be briefed regarding what he can and cannot do in changing plans.

10. CONTACT WITHIN A BUILDING

When an undercover officer enters a house or apartment, he should quickly survey the physical layout of the room, concentrating on doorways and windows which permit exit of the dwelling or the breaking of a window to indicate to the support team that he needs help. Doors also present a problem, because the officer does not know if there is someone behind them who may be armed. Recognizing that he can do very little in such situations, the undercover officer should position himself in such a way that a possible assailant cannot approach him from behind, and attempt to prevent suspects from coming between him and his access to one of the exits.

SUPPORT SURVEILLANCE

1. SUPPORT REQUIREMENTS

During the investigation, the undercover investigator will be supported by a backup or cover team of officers supported by viedo/electronics and photograph means for officer protection and to provide corroborative testimony. The importance of a support team should not be minimized. The safety of the undercover investigator is in the hands of the support officer during the operation, and in a buy/bust situation, they are responsible for making the necessary arrests. For these reasons, the members of the support team and the undercover officer must have a close working relationship. This relationship must be almost intutive, that is, they must know each other and have insight into each other's personality sufficiently well to enable them to complement and reinforce each other in what is often a very fluid environment. They must have a plan of action, not only for expected occurances, but also contingency plans for as many situations as possible.

When the undercover officer enters a building to make a buy or contact the violator, the surveillance officers should maintain a vantage point that will allow them to note the description of each person who enters or leaves the building, as well as descriptions of any vehicles in which they arrive. The guise and conduct of the surveillance officers in conducting the surveillance must be typical and natural for the neighborhood. A particular employment or occupation can usually be used as a pretext.

The undercover investigator must always try to move slowly and cause such delays as may be necessary for the surveillance officers to maintain contact. If at all possible changes in location should be made only if there is a strong probability that the backup team will be able to follow. Secret signals should be pre-arranged between undercover officers and the surveillance cover detail.

2. COMMUNICATION WITH THE COVER TEAM

For undercover investigators involved in long term roles, prior agreements for telephonic or personal contact should be established. These contacts might consist of pre-arranged meeting locations or pre-arranged telephone contact at locations that would not compromise the investigation should the number be obtained by the violator (such as utilization of a public telephone).

PRECAUTIONS AND POSSIBLE PITFALLS

1. Women

There are situations, where the assistance of a female can be a benefit to the investigator in conducting an undercover investigation in that it will arrest suspicions that the suspect may have about the invesigator's presence, or assist in gaining the suspect's confidence. Consideration should be given in the selection of any female to be used in such a capacity so that no allegations will be made of improper conduct on the investigator's part. It is recommended that a female investigator or an officer from another enforcement agency be used for any such role. The investigator must be constantly mindful of the type of people he is dealing with so that the female will not be placed in a compromising situation whereby she or the investigation will be endangered. The decision to use the assistance of a female in an investigation should ultimately be approved by a supervisor/and the United States Attorney's Office.

In addition to the use of a female in an investigation, the undercover investigator must be aware of the possible consequences that could result if he acts too friendly with female associates of the suspect. The undercover investigator's relationship with women relatives and friends of the suspect should be such that he has their cooperation in obtaining the suspect's confidence, but should never extend to the point that it antagonizes the criminal. The undercover investigator should avoid situations which would lead to accusations of improper or intimate relationships.

Additionally, female investigators posing in an undercover role will find themselves faced with similar problems as their counterpart male investigators. Female undercover investigators must concern themselves with the possibility of unwanted advances towards them by male suspects. The female investigator cannot allow herself to be placed in a compromising situation which could cause embarrassment to herself and her agency.

2. DRINKING

The drinking of intoxicants is common among criminal groups. It may be necessary for the undercover investigator to drink in order to gain acceptance. However, drinking should be limited to the minimum required by the circumstances and the undercover investigator should not become intoxicated. The undercover investigator may be able to avoid drinking by using a logical excuse such as stomach ulcers or other illnesses. A successful undercover investigator does not necessarily have to drink for authenticity's sake. Some of the most successful undercover investigator's abstain completely. Regardless of whether the undercover investigator drinks or not, the suspect should not be prohibited from drinking as much as he desires, short of becoming completely intoxicated. Drinking may influence the suspect to talk freely and to accept more readily his association with the undercover investigator.

3. NARCOTICS

The undercover investigator may, during the course of his investigation, find himself faced with marijuana or other narcotic drugs being offered by a suspect for the investigator's consumption at the particular time they are offered. The investigator must be prepared for this situation and be able to act reasonably in the suspect's eyes. Such a possibility may be offset by telling the suspect that "drugs aren't my bag" or "I'm here to do business, we'll party some other time". The undercover investigator must avoid at all costs any use of narcotics.

4. USE OF GOVERNMENT OWNED VEHICLE

The undercover investigator may be placed in a situation where a government vehicle must be used by a suspect. The investigator must exercise extreme care in turning a government vehicle over to a suspect, especially if the investigator will not accompany the suspect in the vehicle. The undercover investigator should anticipate such a possibility in using a government vehicle and discuss any procedure he should follow with his immediate supervisor.

5. CREDENTIALS AND FIREARMS

As stated earlier, to avoid discovery the undercover investigator should not carry his badge or credentials while working on the investigation unless circumstances dictate otherwise. The decision as to whether to carry a firearm and what type * should be made by the undercover investigator and the primary consideration should be that of protection. At one time, the fact that an individual carrying a weapon indicated he was a police officer. Over the last ten years, his has changed, in that now, people engaging in illicit trafficking are not suspected of being officers if they carry a weapon, since many violators carry them. A weapon carried by an undercover officer should not be readily visual to the violator. If the investigator desires to carry a firearm, he should have a practical explanation available if the suspect questions him. The investigator should be aware that carrying a firearm without his credentials could result in his arrest by a local law enforcement officer for carrying a concealed weapon. These charges, of course, could be nolle prossed at a later date. To provide a concealable means of official identification, the undercover investigator may request issuance of Form G-615, Identification Card**.

6. PERSONAL MISCONDUCT

Personal misconduct, as differentiated from established procedures of general conduct of the undercover investigator in his role as a violator, will not be tolerated and will be subject to service disciplinary action appropriate under the circumstances.

*Footnote: AM 2820.07 should be amended to reflect District Director/Chief Patrol authorization of non Service standard weapons for undercover operations.

** AM 2286.02 should be amended to include criminal investigators.

BUY/ORGANIZATIONAL INFILTRATION OPERATIONS

Utimately, the arrest of a suspect will probably stem from a "buy" or from infiltration of the organization. Documents or aliens may be purchased directly from the suspect by an undercover investigator; an informant may make the purchase; or service surveillance units may observe a purchase made by a third party.

The "investigator buy" case directly involves the undercover officer in purchase of documents or aliens. This type of case is ideal for prosecution because the violator has sold directly to a law enforcement officer, and that fact usually convinces a jury of the suspect's guilt. Generally, the only way that this type of case can be lost in court is if the buy was made through illegal methods (see material in these guidelines relating to entrapment). The "investigator buy" case is generally initiated through an informant who introduces the undercover officer to the suspect.

CONTROLLED INFORMANT BUY

1. The controlled informant buy is the least prosecutable of buy cases because the informant is usually involved in criminal activities himself. Since such a case requires the testimony of the informant, it becomes a matter of one criminal's word against another's. The problem of credibility can be eliminated by the proper use of consensual monitoring equipment. In as much as the controlled informant buy may be the only route available to investigators, the following procedures should be followed:

    a. The informant agrees to testify in court.

    b. Thoroughly brief the informant.

    c. Make independent efforts to authenticate the informant's information.

    d. Make no promises to the informant. His participation must be completely voluntary.

    e. Have the informant telephone the suspect while the call is monitored. (Pursuant to Service procedures for consenual monitoring).

    f. Attempt to set the meeting for daylight hours in locations that afford continual surveillance of the informant.

    g. Thoroughly brief all assisting officers.

    h. Inventory informants possessions.

    i. Give informant official funds in marked bills.

    j. Provide surveillance officers a photograph of the informant.

    k. Set pre-buy surveillance at least one hour before the meeting between the informant and the suspect.

l. After the buy, pick up the informant and secure the evidence.

m. After the buy, inventory informants possessions.

n. Obtain a written/taped statement from the informant, giving emphasis to details occurring while he was out of sight or hearing.

o. Return the informant's personal belongings and get a receipt.

p. Corroborate the purchase by taping a call from the informant to the suspect in which the informant comments on the transactions.

q. Advise informant to maintain contact with the case officer.

The buy operation can be further classified with reference to the anticipated arrest strategy. Generally, the investigator may use either the "buy/bust" technique or the "walk-away" buy.

2. BUY/BUST TECHNIQUE

The buy/bust operation is a very useful procedure for investigators. By using buy/bust, the unit does not have to actually send its buy money. The violator is arrested at the time of sale without actually turning over the buy money. The greatest advantage of the buy/bust is that it is economical. It permits arrests for buys while expending minimal funds.

3. WALK-AWAY BUY

The "walk-away" buy is when a buy is made, but an arrest warrant is obtained at a later time. There are three major advantages to using the walk-away buy. The identity of undercover officers or an informant is not given away by making the arrest at the time of the buy. All arrests in an area can be delayed until a simultaneous series of raids can be conducted. The main disadvantage of the walk-away buy, beside the fact that each buy will have to be small in order to minimize the loss of funds, is that execution of simultaneous arrests is expensive in terms of manpower and unit resources.

4. NUMBER OF BUYS

The investigative units should always try to minimize the amount spent on document and alien buys. An investigative unit will run out of buy funds long before it runs out of violators. Therefore, it may be more advantageous for investigators to utilize buy/bust operations.

The number of buys that are needed for a particular case will depend on a number of variables, the direction of the U.S. Attorney, the desire of the investigator to remove an informant from any connection with the sale, or the possibility of catching the seller with a large cache of documents or aliens. When time becomes a factor, the investigator may consider making an additional buy shortly before search/arrest warrants are obtained in order to maintain timelessness for probable cause. The officer might schedule another buy or contact, although it will never be made, so that he can testify to the fact that the suspect was still engaged in criminal activity prior to arrest. Although an investigator intends to execute two or three more preliminary buys, it may subsequently become necessary to seek an indictment and/or arrest on the basis of one buy, if it becomes necessary to abandon the large case for some reason. Therefore, complete written documentation should be prepared on each transaction with the intention of seeking an indictment with every buy or contact.

5. ARRANGEMENTS FOR CONTACTS/BUYS

When arrangements are made for a contact or buy, the operation should take place at a location that has the following characteristics:

a. It is well lighted.

b. Surveillance investigators have ready access to the buy scene and a vantage point to observe it.

c. The suspect's escape routes can be easily blocked.

d. The involvement of non-related personnel is minimized.

e. When a motel is used, two rooms with an adjoining door for rapid access by officers should be employed.

f. The surveillance unit must not be easily seen by the suspect's associates.

Contacts or buys shall be supported by the proper utilization of video and electronic surveillance devices when practical. Adequate number of surveillance officers will be provided for officer safety and the acquisition of evidence.

If at any point the violator appears to be suspicious, the investigator should back off the buy or contact. There is no reason why the investigation should involve unnecesary risks.

CLOSING THE INVESTIGATION

1. TIMING

Another problem encountered by the undercover investigator is in closing the investigation. Many good cases die while investigations are unnecessarily prolonged. Knowing when to quit is as important as knowing how to proceed. The undercover assignment will be considered successfully completed when sufficient evidence has been obtained to take appropriate court action against the suspect or suspects.

The method of closing an investigation is not left to the discretion of the undercover investigator but will be decided by the United States Attorney upon review of the evidence. In some cases consideration may be given to the possibility of the continued use of the undercover investigator by closing the investigation without divulging his true identity.

2. COURT TESTIMONY

The undercover investigator must be aware that the defense attorney will attempt to impeach his testimony and the investigator should expect strenuous cross-examination. The nature of the investigator's association with the defendant and the defendant's associates may be emphasized by the defense attorney in an endeavor to discredit or impeach the investigator's testimony. The attorney may imply that the investigator committed criminal or immoral acts during the investigation and thus that he is an unreliable witness. If, in the course of the investigation, the investigator has participated in violations, arrangements should be made with the U.S. Attorney to have these facts brought out before the court and jury or direct examination, and not wait for it to be brought out on cross-examination. A strenuous cross-examination should not prove embarrassing if the officer has avoided misconduct which could afford ammunition for impeaching the investigator's testimony.

Another approach often taken by the defense attorney is to emphasize that the undercover investigator lied or deceived the defendant about his name and title, or that he procured identification such as registration plates and a driver's license in an alias. The attorney will seek to create the impression that the investigator is not telling the truth on the stand; that he, in fact, lied before and may be lying again; therefore the jury should not believe him. The undercover investigator as a witness must be aware that the attorney may attempt to lead him into admitting he is a liar. The nature of the assignment, of course, requires the agent to mislead the suspect as to his true identity and purpose. The question of whether or not he deceived or lied to the defendant is a conclusion. The investigator should testify only as to the statements he made to the defendant and explain their necessity. Generally, this line of questioning will be expected by the U.S. Attorney and the matter will be discussed prior to trial.

CONCLUSION

From what has been discussed, it can be concluded that an undercover operation is a complicated, investigative technique. Careful analysis and painstaking preparation are involved before any such assignment may be undertaken. A successful undercover investigator must employ resourcefulness, intelligence, initiative, energy and courage towards the successful completion of an assignment. Above all, the investigator entering an undercover role must be completely willing to accept the assignment. In order to successfully accomplish the desired results, the undercover investigator must be aware of the objectives which have been set for the investigation. The undercover investigator should also be aware that he may be faced with long periods of mental and physical stress without adequate food or rest. The personnel selected must be properly documented, thoroughly briefed and safely placed into the actual investigation. Once successfully into the undercover activity, the investigator must be constantly on guard to prevent being placed in situations which could cause embarrassment either to the investigator or the agency. Experience and proficiency in undercover work can be gained only through actual personal contact with suspects. It should, therefore, be pointed out that this text is intended to furnish possible guidelines to the potential undercover investigator in preparation for the initial approach and contact.

IN ADDITION, THE CASE INVESTIGATOR OR UNDERCOVER INVESTIGATOR MAY TERMINATE THE UNDERCOVER OPERATION AT ANYTIME OFFICER SAFETY IS JEOPARDIZED.

APPENDIX E

LEGAL MEMORANDA

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

June 7, 1982

TO : Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice
Attn: Malcolm Wheeler

FROM : American Law Division

SUBJECT : Application of Bribery Statute (18 U.S.C. §201) in Cases Where Payment or Contribution is Made to A Third Party

This memorandum is submitted in response to the committee's request concerning the above subject. Specifically, the inquiry is whether it might be illegal for a Member of Congress to promise to introduce or support specific legislation on behalf of an individual in return for a promise by that individual to (a) provide some benefit to friends of the Member, (b) invest in businesses in the Congressman's district or state, or (c) contribute to the campaign fund of the Member's party.

These questions are governed by 18 U.S.C. §201, and in particular by subsections (c) and (g). Those subsections provide:

> (c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) being induced to do or omit to do any act in violation of his official duty; or

> (g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

Subsection (c) is generally referred to as the "bribery" subsection, and (g) as the "illegal gratuity" subsection. Certain key elements of the bribery and illegal gratuity subsections, and of certain significant differences between the two offenses, will be briefly considered here, and explored in more detail in connection with the discussion below of whether each of the factual situations posed by the committee might constitute an offense under either 18 U.S.C. §201(c) or (g). The general discussion here is based largely on United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974), which examined the differences between the two subsections in a prosecution of a Member of Congress. In that case, the defendant was charged with accepting bribes and illegal gratuities while he was a U.S. Senator. He was convicted on three counts of violating section 201(g), and on appeal he argued, inter alia, that section 201(g) was unconstitutionally vague or overbroad as applied to elected public officeholders. The court of appeals held that the criminal intent required for a conviction precluded a finding that the statute was vague, and concluded that the provision was not overbroad since it did not apply to legitimate campaign contributions protected by the first amendment. See 506 F.2d at 76-77. However, the conviction was reversed and the case remanded for a new trial because the trial court's instructions did not set forth a clear standard for the jury to distinguish among receiving a bribe, an illegal gratuity, and a legitimate campaign contribution.[1]

---

[1] In a prior decision remanding the case back for trial the Supreme Court in United States v. Brewster, 408 U.S. 501 (1972), had previously held that the speech or debate clause of the Constitution (art. I, sec. 6, cl. 1) does not preclude a criminal prosecution of a Member of Congress if the government's case does not rely on proof of legislative acts or the motivation for those acts.

Both subsections (c) and (g) prohibit a public official (including a Member of Congress) from receiving or agreeing to receive anything of value in certain circumstances. The two provisions are directed at generally similar types of conduct and, depending on the facts of the case, subsection (g) may be charged as a lesser included offense of subsection (c). See United States v. Brewster, supra, 506 F.2d at 68-76. The first major distinction between (c) and (g) is that the latter prohibits the receipt of anything of value only by the public official "for himself," whereas the former bars the receipt of anything of value by the public official "for himself or for any other person or entity." Second, a specific quid pro quo is required for a conviction under (c) but not under (g). Subsection (c) prohibits the receipt of "anything of value ... in return for: (1) being influenced in his performance of any official act ...." (emphasis added) However, subsection (g) bars the receipt by a public official of anything of value "for or because of any official act performed or to be performed by him," even if the official act was not motivated by the payment. As the court stated in United States v. Brewster, supra, 506 F.2d at 72: "The bribery section makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act." And third, (c) requires that the payment be received "corruptly" whereas (g) merely specifies that it be received "otherwise than as provided by law for the proper discharge of official duty,... for or because of any official act performed or to be performed by him...." Although in the case of a prosecution of a Member of Congress under (g) there need not be proof of a corrupt intent, criminal intent must still be shown. United States v. Brewster, supra, 506 F.2d at 73 n. 26. "...[T]o convict an accused under [18 U.S.C. §201(g)], it is necessary that the Government prove that he committed the act prohibited knowingly and purposefully and not through accident, misunderstanding, inadvertence, or other innocennt reasons." United States v. Irwin, 354 F.2d 192, 197 (2d Cir. 1965).

BENEFIT TO MEMBER'S FRIEND

Would it be illegal for a Member to promise to introduce or support a particular bill in return for a promise by an individual to provide a particular benefit to a friend of the Member? Such an agreement would not constitute a violation of 18 U.S.C. §201(g), since under that subsection the payment must be for the public official himself. However, this type of agreement could constitute a violation of subsection (c), since that provision prohibits the payment of anything of value for the public official "himself or for any other person or entity ...." (emphasis added) A payment to a Member's friend would constitute payment to "any other person" within the terms of the statute. Of course, the agreement made by the Member would be illegal under subsection (c) only if the other elements of the offense were satisfied, including proof that the payment to the friend was the quid pro quo for the Member's official act, and that the Member had the requisite corrupt intent.

INVESTMENT IN MEMBER'S DISTRICT

Would it be unlawful for a Member to promise to introduce or support a bill in exchange for a promise by an individual to invest in businesses in the Member's district or state? Such an agreement would not appear to constitute a violation of subsection (g) since that provision requires that the payment of the thing of value be for the public official himself. But this type of agreement could possibly fall within the terms of (g) if the investment were in a business owned entirely by the Member or in one in which he had a substantial interest or in a sham corporation that was essentially the alter ego of the Member. The court in United States v. Brewster, supra, 506 F.2d at 75-76, indicated that a contribution to a campaign committee which is in fact the alter ego of a Member might constitute a violation of the illegal gratuity section. Regardless of whether a Member has any interest in the business, this type of agreement might be a violation of (c), since under that provision the payment is prohibited if made to the public official himself or to "any other person or entity ...." (emphasis added) A business in the Member's district would appear to be an "entity" within the meaning of the statute.

Apart from the matter of for whom the payment is made, the applicability of subsection (c) to an agreement to invest in a Member's district may depend on whether, under the particular facts of the case, it is possible to prove that (1) the Member had the requisite corrupt intent and (2) there was a promise to introduce or support a particular bill in return for a particular investment (i.e., a quid pro quo). Unless the public official agrees to accept a thing of value "corruptly," there is no violation of subsection (c). See United States v. Evans, 572 F.2d 455, 480 (5th Cir. 1978). "The requisite 'corrupt' intent has been defined as 'incorporating a concept of the bribe being the prime mover or producer of the official act.'" United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978) (quoting United States v. Brewster, supra, 506 F.2d at 82). The court in Strand indicated, 574 F.2d at 995, that proof of a quid pro quo serves to demonstrate that the defendant acted corruptly. If the prosecution can offer evidence that in return for the promise to invest in a particular business enterprise in his district, a Member agreed to introduce or support a specific bill, this would seem to satisfy the quid pro quo requirement and also demonstrate that the Member acted corruptly. However, if as an inducement for a promise by an individual to invest in one or more unspecified business ventures in his districts, a Member agreed to support, for example, all legislation beneficial to small businesses, it is questionable whether in such a situation there was a specific quid pro quo and whether the Member acted with a corrupt intent.

CAMPAIGN CONTRIBUTION

Can a Member promise to introduce or support a particular bill in exchange for a promise by an individual to contribute to the campaign fund of the Member's party without violating 18 U.S.C. §201? Assuming that the party campaign fund or commitee is a legitimate entity which is distinct from the Member and not merely his alter ego (see United States v. Brewster, supra, 506 F.2d at 75-76), such an agreement would not be a violation of subsection (g) because that provision applies only if the payment is for the public official himself. However, as discussed above, under subsection (c) the payment may be for the public official himself or for "any other person or entity," and a party campaign fund would appear to be included within this language. In United States v. Shirey, 359 U.S. 255 (1959), the Court held that 18 U.S.C. §214 (presently codified as 18 U.S.C. §210), which prohibits promises of payments to "any person, firm, or corporation" as consideration for the use of influence to obtain an appointive office, was applicable in a case where an office-seeker offered to donate a sum annually to the Republican Party. Relying on statutory construction and legislative history, the Court found that a political party was a "person" within the meaning of 18 U.S.C. §214.

Apart from the question of for whom the payment is made, the applicability of (c) to receipt by a Member of a campaign contribution depends on whether the Member possessed a corrupt intent and on whether a particular contribution was the quid pro quo for a particular official act by the Member. It is the criminal, corrupt intent which largely distinguishes a legitimate campaign contribution from an illegal bribe. See United States v. Brewster, supra, 506 F.2d at 73 n. 26; United States v. Anderson, 509 F.2d 312, 330 (D.C. Cir. 1974); Campaign Contributions and Federal Bribery Law, 92 Harv. L. Rev. 451, 453 (1978). The fine line to be drawn between a campaign contribution and a bribe has been criticized. "To rest the distinction between a bribe and a campaign contribution on whether the money is given 'corruptly' raises problems of vagueness. The statute nowhere defines 'corruptly' and the legislative history offers only the unhelpful terminological substitution of dishonest intent for 'corruptly.'" Campaign Contributions and Federal Bribery Law, supra (footnote omitted).

The distinction between an illegal bribe and a legitimate campaign contribution perhaps can be seen most clearly by focusing on the element of quid pro quo. In United States v. Brewster, supra, in reversing the conviction of a Senator under 18 U.S.C. 201(g) on the ground that the trial court's instructions did not set forth a clear standard for the jury to make the distinctions among receipt of a bribe, receipt of an illegal gratuity, and receipt of a normal campaign contribution, the court of appeals observed, 506 F.2d at 81:

> No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence. [emphasis added]

Thus, a payment in return for a specific official act may be a bribe under section 201(c), whereas a contribution made because "the giver supports the acts done or to be done by the elected official" (United States v. Brewster, supra, 506 F.2d at 73 n. 26) or even one "inspired by the recipient's general position of support on particular legislation" (United States v. Anderson, supra, 509 F.2d at 330; see United States v. Brewster, supra, 506 F.2d at 81) is a common and legal campaign practice. In short, in a bribe situation, an elected official corruptly receives a payment and as a result is influenced in the performance of a particular official act, whereas with a campaign contribution, the candidate receives money which is likely given because of the donor's support of the candidate's record in general or his position on a particular issue, but the candidate is not obligated as a result of the payment to perform any particular official act.

CONCLUSION

If a Member of Congress were to promise to introduce or support specific legislation on behalf of an individual in return for a promise by that individual to (a) provide some benefit to friends of the Member, (b) invest in businesses in the Congressman's district or state, or (c) contribute to the campaign fund of the Member's party, such an agreement would not appear to constitute a violation of 18 U.S.C. §201(g), prohibiting illegal gratuities, since that provision applies only where the thing of value is paid for the public official himself. (If the friend, business, or campaign fund were found to be acting as the Member's *alter ego*, then section 201(g) might apply to such an agreement.) However, any of these types of agreements might be prohibited by 18 U.S.C. §201(c), since that subsection applies regardless of whether the thing of value is given for the public official himself "or for any other person or entity...." In a successful prosecution under subsection (c), the government would have to prove that the Member acted corruptly, and that the thing of value was the *quid pro quo* for a particular official act by the Member. The requirement that the Member receive the thing of value "corruptly" may be especially difficult to demonstrate where payment is made to a campaign fund, but a bribe can perhaps best be distinguished from a legitimate campaign contribution by focusing on whether payment is made in return for a particular official act (a bribe) or because the donor supports the legislator's overall record or his general position on a particular bill (a legitimate campaign contribution).

Jay R. Shampansky

Jay R. Shampansky
Legislative Attorney

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

June 30, 1982

TO : Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice
Attention: Malcolm Wheeler

FROM : American Law Division

SUBJECT : Additional Information Concerning Application of Bribery Statute in Cases Where Payment or Contribution is Made to a Third Party

This memorandum is submitted in response to the questions posed in the committee's letter of June 10, 1982. The analysis here supplements the information provided to the committee in our memorandum of June 7, 1982, on the same subject.

Questions 1 and 2. The committee asks when 18 U.S.C. § 201(c) and (g) were enacted, and whether the analysis in our June 7, 1982, memorandum is confirmed by judicial interpretations of any predecessor statute. The research on which our June 7 memorandum was based included an examination of all pertinent case law in the annotations to 18 U.S.C. § 201 in United States Code Annotated. These annotations are not limited to cases decided under the present section 201, but include cases under predecessor statutes.

Section 201 is derived from the act of Feb. 26, 1853, c. 81, § 6, 10 Stat. 171, and the act of July 16, 1862, c. 180, 12 Stat. 577. The 1853 statute provided in pertinent part as follows:

> That if any person or persons shall, directly or indirectly, promise, offer, or give, or cause or procure to be promised, offered, or given, any money, goods, right in action, bribe, present, or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money,

> goods, right in action, bribe, present, or reward, or any other valuable thing whatever, to any member of the Senate or House of Representatives of the United States, after his election as such member, and either before or after he shall have qualified and taken his seat,...with intent to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the United States, be brought before him in his official capacity,... and shall be thereof convicted, such person or persons...and the member...who shall in anywise accept or receive the same, or any part thereof, shall be liable to indictment as for a high crime and misdemeanor...; and shall, upon conviction thereof, be fined not exceeding three times the amount so offered, promised, or given, and imprisoned in a penitentiary not exceeding three years; and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such place of trust or profit as aforesaid, shall forfeit his office or place; and any person so convicted under this section shall forever be disqualified to hold any office of honor, trust, or profit, under the United States.

The 1862 statute provided:

> That any member of Congress or any officer of the government of the United States who shall, directly or indirectly, take, receive, or agree to receive, any money, property, or other valuable consideration whatsoever, from any person or persons for procuring, or aiding to procure, any contract, office, or place, from the government of the United States or any department thereof, or from any officer of the United States, for any person or persons whatsoever, or for giving any such contract, office, or place to any person whomsoever, and the person or persons who shall directly or indirectly offer or agree to give, or give or bestow any money, property, or other valuable consideration whatsoever, for the procuring or aiding to procure any contract, office, or place as aforesaid, and any member of Congress who shall directly or indirectly take, receive, or agree to receive any money, property, or other valuable consideration whatsoever after his election as such member, for his attention to services, action, vote, or decision on any question, matter, cause or proceeding which may be pending, or may by law or under the Constitution of the United States be brought before him in his official capacity, or in his place of trust and profit as such member of Congress, shall, for every such offense,

> be liable to indictment as for a misdemeanor in any court of the United States having jurisdiction thereof, and on conviction thereof shall pay a fine of not exceeding ten thousand dollars, and suffer imprisonment in the penitentiary not exceeding two years, at the discretion of the court trying the same; and any such contract or agreement, as aforesaid, may at the option of the President of the United States, be absolutely null and void; and any member of Congress or officer of the United States convicted, as aforesaid, shall, moreover, be disqualified from holding any office of honor, profit, or trust under the government of the United States.

The 1853 and 1862 statutes were derived, respectively, from H.R. 326, 32d Cong., and S. 358, 37th Cong. Our research has not revealed any discussion of these bills in the Congressional Globe. The 1853 and 1862 statutes were codified in three sections of the Revised Statutes. See R.S. §§ 1781, 5500, 5502 (1875). They were consolidated in one section in the act of Mar. 4, 1909, c. 321, § 110, 35 Stat. 1108. This section was included in the 1948 recodification of the federal criminal code. Act of June 25, 1948, Pub. L. 772, c. 645, § 205, 62 Stat. 691. The House and Senate reports on the 1948 act shed no significant light on the quid pro quo or corrupt intent elements of bribery. See H.R. Rept. No. 304, 80th Cong., 1st Sess. (1947); S. Rept. No. 1620, 80th Cong., 2d Sess. (1948).

In 1962, the section was included in a general revision of the laws relating to bribery, graft, and conflicts of interest. Act of Oct. 23, 1962, Pub. L. 87-849, § (1)(a), 76 Stat. 1119. The House report on the 1962 act has a brief discussion of the term "corruptly" as it is used in subsection (b) of section 201, but not specifically in regard to the term's use in (c). However, the term presumably has the same or a similar meaning in the two subsections. According to H.R. Rept. No. 748, 87th Cong., 1st Sess. 18 (1961): "The word 'corruptly' which is also used in obstruction-of-justice statutes (18 U.S.C.

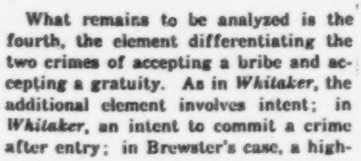
1503-1505), means with wrongful or dishonest intent." In the section-by-section analysis, the report states, id., in regard to (c):

> The language used in subsection (c) emphasizes that it is the purpose for which the recipient knows the bribe is offered or given when he solicits, receives, or agrees to receive it which is determinative of criminality. Some courts have given this interpretation to the present section 202. (See, e.g., Woelfel v. United States, 237 F.2d 484, 488; Whitney v. United States, 99 F.2d 327, 331.)

The Senate report (S. Rept. No. 2213, 87th Cong., 2d Sess. (1962)) contains no further clarification of section 201.

Question 3. The committee inquires as to whether "corruptly" is used in other federal statutes and, if so, how the term in those statutes has been construed by the courts. An analysis of the various formulations of the mens rea requirement (including "corruptly"), a listing of various provisions in Title 18 with an indication of the statutory language used concerning mens rea, and an examination of judicial interpretations of these mens rea requirements, appears in Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. I, at 118-35 (1970). A discussion of the "corrupt" requirement in section 201 is included in the section of the Working Papers on bribery (pages 685-698). Copies of these parts of the Working Papers are enclosed.

Question 4. The case of United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974), was discussed in some detail in our memorandum of June 7, 1982. The committee asks what the Brewster court said in regard to the "corrupt" element. The discussion in Brewster of "corrupt" is set forth below (506 F.2d at 71-72, 81-82):



> What remains to be analyzed is the fourth, the element differentiating the two crimes of accepting a bribe and accepting a gratuity. As in *Whitaker*, the additional element involves intent; in *Whitaker*, an intent to commit a crime after entry; in Brewster's case, a high-

er degree of criminal intent to constitute accepting a bribe under section (c)(1) than to constitute accepting a gratuity under section (g).

We thus turn to those clauses of the two statutory sections which we have labelled "A" and "C" (see p. 67 *supra*).

[4] The requisite intent to constitute accepting a bribe is to accept a thing of value "corruptly" under section (c)(1); the comparable intent under the gratuity section (g) is to accept a thing of value "otherwise than as provided by law for the proper discharge of official duty." On the face of the statute the two comparative clauses are not equivalents. Congress did not use the same language in defining criminal intent for the two offenses. "Corruptly" bespeaks a higher degree of criminal knowledge and purpose than does "otherwise than as provided by law for the proper discharge of official duty." It appears entirely possible that a public official could accept a thing of value "otherwise than as provided by law for the proper discharge of official duty," and at the same time not do it "corruptly." Congress obviously wished to prohibit public officials accepting things of value with either degree of criminal intent; it did so, but it legislated a difference in the requisite criminal intent and correspondingly in the penalties attached.

There is more, on the face of the statute itself, relevant to criminal intent. What we have labelled as comparative clause "C" relates to clause "A" and to criminal intent. To accept a thing of value "*in return for*: (1) *being influenced* in [the] performance of any official act" (section (c)(1), emphasis supplied) appears to us to imply a higher degree of criminal intent than to accept the same thing of value "for or because of any official act performed or to be performed" (section (g)). Perhaps the difference in meaning is slight, but Congress chose different language in which to express comparable ideas. The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.

Our conclusion is reinforced when the two clauses "A" and "C" are transposed in each section to be read consecutively. To accept a thing of value "corruptly . . . in return for being influenced in his performance of any official act" evidences a higher degree of criminal intent than to accept the same thing of value "otherwise than as provided by law for the proper discharge of official duty . . . for or because of any official act performed or to be performed by him." When clauses "A" and "C" are thus considered together in each section, the bribery section (c)(1) obviously prescribes a criminal intent different from and of a higher degree than that specified in the illegal gratuity section (g).

[5] The different and higher requisite degree of criminal intent, then, is the additional element which is essential to make the offense of bribery under section 201(c)(1) the greater offense in relation to the lesser included offense of accepting an illegal gratuity under section 201(g).

* * *

In defining the proof necessary to convict under the lesser included offense, the judge further instructed that there must be proof that the act of the defendant in receiving the money "was done for or because of acts to be performed by him in his official capacity, and was done *willfully and knowingly* rather than by mistake or accident." In the context of the whole instruction, what does "willfully and knowingly" mean? What difference, perceptible to the jury, is there from the instruction under the greater offense that the defendant or committee had to receive the money with "his knowledge of, in return for being influenced"?

More importantly, since "willfully and knowingly" could mean that defendant Brewster *knew* when he accepted the money that he was receiving the contribution because of his record of performance in this field of postal legislation, and that *if* he continued such legislative actions in the future (particularly the near future) he would likely receive further contributions, how does this instruction distinguish the contribution found to be illegal here from a perfectly legitimate contribution? No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence.

The likelihood of misunderstanding because of the failure at this point to distinguish between criminal and innocent acceptance of funds was enhanced by the very next sentence of the instruction on the lesser included gratuity offense: "There need *not* be proof, however, that there was *any corrupt intent* on the part of defendant Brewster to be influenced in the performance of an official act." Did this instruction rule out any criminal intent whatever under the lesser included gratuity offense? However ill-defined it may be in the exact words of the statute, there is and must be a general criminal intent on the part of the defendant to support a conviction under the gratuity section (g).

Conscious of his duty to make clear the difference between guilt under either section of the statute and normal innocent acts, the District Judge further told the jury that "campaign contributions given to legislators with whose general positions . . . a contributor agrees and in the hope only that the position will continue, is entirely proper and legal. Therefore, in order to find a violation of 201(g) you must find that defendant Brewster received the monies in question *knowing* that it was given and was *accepted for or because of an official act* he is going to undertake in the future *with respect to a particular legislative matter.*"

This does help differentiate in the jury's mind between criminal and innocent acceptances of funds, if such were possible at this stage of the instructions, but only at the cost of muddying whatever clarity had been achieved earlier in distinguishing between the two criminal offenses. What is the difference between the intent defined by "knowing" plus the other language of the instruction here under section (g), and the intent required by "corruptly," as "corruptly" was defined by the trial judge under section (c) earlier? And what is the difference between "accepted for or because of an official act . . . with respect to a particular legislative matter" here under section (g), and "in return for his being influenced in the future in his performance of official acts," as the judge had charged was necessary to convict under section (c)?

Perhaps by focusing on this paragraph of the instructions alone, and by ignoring the foregoing, the jury would have been able to tell the difference between an innocent contribution and guilt on some charge, but which charge? And, of course, we cannot think that the jury paid attention only to this part of the instruction; they were obligated to digest the whole of it.

We think the whole of it was indigestible, and we do not purport to prescribe for this case or in the abstract for all cases a complete recipe or formula to enable the jury to make an intelligent determination of guilt when both offenses are charged. From our lengthy previous discussion of the graphic distinctions between the two statutes we trust a trial judge can distill the elements on which the jury should be instructed to focus. We have laid emphasis under the bribery section on "corruptly . . . in return for being influenced" as defining the requisite intent, incorporating a concept of the bribe being the prime mover or producer of the official act. In contrast under the grauity section, "otherwise than as provided by law . . .

for or because of any official act" carries the concept of the official act being done anyway, but the payment only being made because of a specifically identified act, and with a certain guilty knowledge best defined by the Supreme Court itself, *i. e.*, "with knowledge that the donor was paying him compensation for an official act . . . evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient . . . ."[49]

---

[49] Note 38 *supra*.

Question 5. The quid pro quo required to convict a Member of Congress of bribery under 18 U.S.C. § 201(c) seems clearly to exist if the prosecution can offer evidence that in return for the promise to invest in a particular business enterprise in his district, a Member agreed to introduce or support a specific bill. If it could be proved by prior memoranda that the investor had already decided to invest in the identical manner at the time he made his promise to the Member, the quid pro quo required to convict the Member would still seem to be present. The court stated in United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974): "The bribery section makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act." (emphasis added) In other words, where a bribe is offered or paid to a Member of Congress, the Member is influenced in his performance of an official act because of the bribe. The fact that the briber may have already decided to invest before he made his promise to the Member, and the fact that the investor may derive some economic benefits (profits, dividends, etc.) from his investment in addition to obtaining desired action by the Member on particular legislation are irrelevant in determining whether a quid pro quo is present in a case brought against the Member. Assuming that the Member is unaware of the investor's prior decision, if the Member's promise to act or his action on a bill is motivated by the investor's promise or payment, the required quid pro quo under 18 U.S.C. § 201(c) appears to be present.

Question 6. In our memorandum of June 7, 1982, we stated (at p. 6): "...[I]f as an inducement for a promise by an individual to invest in one or more unspecified business ventures in his district, a Member agreed to support, for example, all legislation beneficial to small businesses, it is questionable whether in such a situation there was a specific quid pro quo and whether the Member acted with a corrupt intent." The committee's letter of June 10, 1982, inquires whether in this hypothetical, it is the quid or the quo which is missing. Our statement that in such a case a "specific quid pro quo" might be lacking was based on the absence of sufficient specificity, not on the absence of a quid pro quo. According to Black's Law Dictionary 1123 (5th ed. 1979), the term "quid pro quo" is "used in law for the giving [of] one valuable thing for another." In the hypothetical, the Member's promise of support for small business legislation might be said to have been given in return for the individual's promise to invest in the Member's district. However, the Member did not agree to introduce or support any particular bill, and the investor did not promise to invest a particular sum in a particular business. In United States v. Brewster, 506 F.2d 62, 81 (D.C. Cir. 1974), in reversing the conviction of a Senator under 18 U.S.C. § 201(g) on the ground that the trial court's instructions did not set forth a clear standard for the jury to make the distinctions among receipt of a bribe, receipt of an illegal gratuity, and receipt of a normal campaign contribution, the court of appeals observed:

> No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line bewteen guilt and innocence. [emphasis added]

To use the language of the Brewster court, in the investment hypothetical there is no "definite official act for which the [investor] intends to compensate...." It might be noted that it is this same lack of specificity which distinguishes an illegal bribe from a legitimate campaign contribution. A payment in return for a specific official act may be a bribe under section 201(c), whereas a contribution made because "the giver supports the acts done or to be done by the elected official" (United States v. Brewster, supra, 506 F.2d at 73 n. 26) or even one "inspired by the recipient's general position of support on particular legislation" (United States v. Anderson, 509 F.2d 312, 330 (D.C. Cir. 1974); see United States v. Brewster, supra, 506 F.2d at 81) is a common and legal campaign practice. In the absence of specificity in the quid pro quo, it may be difficult, if not impossible, to prove that the Member acted with a corrupt intent. See United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978).

Question 7. The gratuity subsection, 18 U.S.C. § 201(g), prohibits a public official from "directly or indirectly" asking, demanding, exacting, soliciting, seeking, accepting, receiving, or agreeing to receive anything of value "for himself" due to his performance of an official act. (emphasis added) Such payment is barred where made "otherwise than as provided by law for the proper discharge of official duty...." Thus, the payment can be made indirectly to the public official, but under subsection 201(g), unlike 201(c), the public official must be the beneficiary of the payment. (Under subsection 201(c), which prohibits bribery, the offense is committed if payment is made directly or indirectly for the public official "himself or for any other person or entity....") If the payor (X) of an illegal gratuity gives a sum of money to Y to be turned over to a Member of Congress because of a particular official act that he has performed or will perform, and the Member accepts or agrees to accept the payment from Y, the Member has violated subsection 201(g) if he had the requisite criminal intent. Similarly, if X contributes a sum of money to a campaign committee of the Member which is not a legitimate, independent entity but is in fact the *alter ego* of the Member, and if payment is made because of the Member's performance of a particular official act, then subsection 201(g) has been violated if the Member possessed the required criminal intent. See *United States* v. *Brewster*, 506 F.2d 62, 75-76 (D.C. Cir. 1974).

Question 8. The most complete listing of cases decided under 18 U.S.C. § 201(c) and (g) appears in the annotations in *United States Code Annotated*. These annotations include cases decided under the current statutory provisions as well as under predecessor statutes. A copy of the pertinent annotations is enclosed.

Jay R. Shampansky

Jay R. Shampansky
Legislative Attorney

Hughes Hubbard & Reed
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
TELEPHONE: 202-626-6200
TELEX: 892674

ONE WALL STREET
NEW YORK, NEW YORK 10005
212-943-6500

47, AVENUE GEORGES MANDEL
75016 PARIS, FRANCE
553-9901

555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071
213-489-5140

111 EAST WISCONSIN AVENUE
MILWAUKEE, WISCONSIN 53202
414-271-8827

July 19, 1982

Memorandum for the United States Senate
Select Committee to Study Law Enforcement
Undercover Activities of Components of
the Department of Justice

The Application of the Federal Bribery Laws to the Conduct of Legislators

This memorandum responds to the following questions raised in the agreement dated June 2, 1982, between the Select Committee and this Firm.

QUESTIONS

1. If a legislator personally accepts a payment of cash in return for his promise to cause some branch of the United States Government to cause a specified event or circumstance to occur, is that acceptance an acceptance of a bribe, even if the legislator cannot engage in any formal legislative conduct -- *e.g.*, voting on the floor, voting in committee, proposing legislation -- that would help to fulfill his promise?

2. If a legislator personally accepts a payment of cash in return for his promise to cause some branch of the United States Government to cause a specified event or circumstance to occur, is that acceptance an acceptance of a bribe, even if the legislator has no intent to fulfill his promise and has fraudulently induced the payment to him?

3. If a legislator personally accepts a payment of cash in return for his promise to cause some branch of the United States Government to cause a specified event or circumstance to occur, is that acceptance an acceptance of a bribe, even if the legislator has been led to believe that he will never be asked to fulfill his promise?

SUMMARY OF CONCLUSIONS

1. A legislator who personally accepts a payment of cash in return for his promise to cause the Executive Branch or the Legislative Branch of the United States Government to cause a specified event or circumstance to occur is guilty of accepting a bribe, even where the legislator does not engage in any formal legislative conduct. A legislator who personally accepts a payment of cash in return for his promise to cause the Judicial Branch of the United States Government to cause a specified event or circumstance to occur is not guilty of accepting a bribe, except in a limited category of cases.

2. A legislator who personally accepts a payment of cash in return for his promise to cause the Executive Branch or the

Legislative Branch of the United States Government to cause some specified event or circumstance to occur is guilty of accepting a bribe, even if the legislator does not intend to fulfill his promise and has fraudulently induced the payment to him.

3. A legislator who personally accepts a payment of cash in return for his promise to cause the Executive Branch or the Legislative Branch of the United States Government to cause some specified event to occur is guilty of accepting a bribe, even if the legislator has been led to believe that he will never be asked to fulfill his promise.

DISCUSSION

The main federal bribery statute, 18 U.S.C. § 201, prohibits the giving or receiving of something of value in a variety of circumstances. The core of the statute's prohibition against the receipt of bribes is subsection (c), which provides:

> "(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:
>
> "(1) being influenced in his performance of any official act; or
>
> "(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> "(3) being induced to do or omit to do any act in violation of his official duty; . . .
>
> "Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of

> value, whichever is greater, or imprisoned for not more than fifteen years, or both . . . ."

Thus, the federal bribery statute makes it illegal for a "public official" to solicit or receive anything of value in return for being influenced in his performance of any "official act."

The statute specifically includes a "Member of Congress" within the definition of a "public official," and defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit." 18 U.S.C. § 201(a).

I. Influence Over Non-Legislative Decisions.

The first question posed by the Select Committee is whether a legislator may be guilty of bribery for promising to exert influence over governmental decisions that are to be made by another official, including an official in a different branch of government. Put another way, the issue is whether bribery is confined by statute to the direct corruption of the actual decision-maker. The statute is not so limited.

This conclusion rests in part on the language of the statute and in part on its purpose. The statute prohibits an official from accepting something of value to influence him in the performance of "*any* official act," and "official act" is broadly defined to include "any decision *or action* on *any* question" taken "in his official capacity" (emphasis added).

The key to answering the question posed is to determine the range of actions that a legislator takes in his official capacity. We conclude that the concept of "official capacity" is sufficiently expansive so that a legislator may be guilty of bribery if he promises to attempt to influence non-legislative decisions.

A. Cases Involving Bribery.

We think that prior cases settle this principle. For example, in United States v. Birdsall, 233 U.S. 223 (1914), the Supreme Court considered whether payments to officers of the Department of Interior with responsibility for Indian affairs constituted an attempt to influence an "official act." The officers were paid to recommend to the Commissioner of Indian Affairs that the Commissioner advise the President, the federal judge imposing sentences, the Attorney General, the Secretary of Interior and the United States attorney, that certain persons convicted of unlawfully selling liquor to Indians should be granted leniency. 233 U.S. at 230. The ultimate governmental actions lay within the province of the President, who could grant Executive clemency, or the judge, who could determine the sentences imposed. Technically, the Interior Department employees had no official power over the decision. Nevertheless, the Court held that an "official act" is not limited to the defendant's own, formal statutory duties. The Court explained:

> "Every action that is within the range of official duty comes within the purview of these

> sections [the antecedents of 18 U.S.C. §§ 201(b), (c)] . . . . In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery." Id. at 230-231.

The Court's holding in Birdsall is significant for two reasons. First, the Court ruled that in determining the existence of an "official act," it is immaterial whether the public official accepting the payment possesses the authority actually to make a decision or perform the act benefitting the person who makes the payment. An "official act" exists where the public official accepting the payment merely possesses the ability through the use of his own public office to influence some other governmental decision-maker. In Birdsall, the Court assumed that the indictment sufficiently charged that the officers who accepted the payment violated their official duties as established by the "regulations and usages" of the Department of Interior. 233 U.S. at 231. The Court found that, in evaluating an application for clemency, the President was likely to rely on the judgment of the Secretary of Interior, the Attorney General or the Commissioner of Indian Affairs. The Court also found that the judge determining sentences might seek a recommendation from the Commissioner of Indian Affairs or the United States attorney. Since the officers accepting the payment were able to use their government positions to influence the judgment of the Commissioner of Indian Affairs -- who could influence the other government officials involved in the decision -- the Court concluded that their actions were within the scope of their official duties. Id. at 234-235.

Second, the touchstone of an "official act" under Birdsall is whether, even if the activities are not formally defined to be part of the official's functions, it is "settled practice" for the public official to become involved in activities of that kind. Where the normal functions of a public official include certain activities, those activities fall within his official capacity.

These criteria easily encompass efforts by members of Congress to influence formal action by the Legislative Branch of the Government. In addition, a legislator possesses the ability to influence an action by the Senate or the House of Representatives without engaging in any formal conduct such as introducing a bill or casting a vote. Informal conduct within the legislature, including, for example, policy discussions with fellow legislators or legislative staff, is certainly part of the "settled practice" of arriving at legislative decisions.

These criteria also indicate that efforts by Members of Congress to influence Executive Branch activities constitute "official acts." Although Members of Congress do not possess the statutory power to make Executive Branch decisions directly, they have the ability to influence them. Moreover, the involvement of Members of Congress in influencing Executive Branch activities is "settled practice." In overseeing the administration of federal statutes, Senators and Representatives are frequently involved in influencing the activities and decisions of the Executive Branch. See Gravel v. United States, 408 U.S. 606, 625 (1972) (discussed below).

One appellate court has expressly dealt with the application of the concept of an "official act" to congressional attempts to influence Executive Branch decisions. In United States v. Carson, 464 F.2d 424 (2d Cir.) cert. denied 409 U.S. 949 (1972), the court held that an attempt by an administrative assistant to a member of the Senate Judiciary Committee to influence a Justice Department action constituted an "official act."[*] The defendant, Carson, was paid to attempt to influence a pending Justice Department action against a specific individual. Carson was found guilty of conspiracy to commit bribery, in violation of 18 U.S.C. § 371, and of perjury before a federal grand jury, in violation of 18 U.S.C. § 1621. Carson contended on appeal that any bribe "he might have been found to have taken could only be one in return for his being influenced in his personal or political capacity and in the performance of a personal act," Id. at 433, and that personal influence was "not within the scope of the bribery statute, for it is inconsistent with the term 'official act.'" Id. at 432. The court of appeals rejected that argument. Its holding in Carson rested on the two criteria established by Birdsall.

---

[*] Congressional aides are "public officials" within the meaning of the bribery statute. The statute's definition of a "public official" includes "an employee or person acting for or on behalf of the United States, or any . . . branch of Government thereof, . . . in any official function, under or by authority of any such . . . branch of Government." 18 U.S.C. § 201(a).

First, the court stated that there is "no doubt that federal bribery statutes have been construed to cover any situation in which the advice or recommendation of a government employee would be influential, irrespective of the employee's specific authority (of lack of same) to make a binding decision." Id. at 433. The court also noted: "It is the corruption of official positions through misuse of influence in governmental decision-making which the bribery statutes make criminal." Id. at 434. The court had little difficulty in concluding that "appellant, as an administrative assistant to a member of the Senate Judiciary Committee, clearly is in a situation in which his influence in connection with federal criminal charges or penalties is sought. 464 F.2d at 433.

Thus, the Carson court recognized that the essence of an "official act" is the ability to use one's own public position to influence a governmental decision rather than the power to make the actual decision, and determined that the influence which congressional employees may exert on Executive Branch activities is sufficient to satisfy this requirement. As compared with congressional staff employees, of course, Senators and Representatives possess even greater influence over Executive Branch decisions. Accordingly, there is little doubt that their efforts to influence such decisions also constitute "official acts." Indeed, the court in Carson noted that Congressmen are the source of whatever influence their staffs possess. 464 F.2d at 434.

The second Birdsall criterion applied in Carson was the determination that exerting influence on Executive Branch activities was part of Carson's normal duties. The court noted that Carson had testified that "he as an administrative assistant to Senator Fong would exert influence on various government agencies and branches of the Government 'without any strings attached.'" Id. The court concluded: "That administrative assistants as part of their 'duties' exert the influence inherent in their employment relationship with members of Congress appears 'clearly established by settled practice,' in the language of United States v. Birdsall." Id.

If the normal duties of congressional employees include influencing Executive Branch decisions, then this "settled practice" clearly covers Members of Congress as well. Like their employees, Members of Congress -- who question government witnesses at hearings, send numerous letters to government agencies, and place frequent telephone calls to other public officials -- are constantly involved in this process.

B. Cases Not Involving Bribery.

Additional support for these conclusions comes from several other cases unrelated to the bribery statutes. In several cases the Supreme Court has indicated that it conceives of congressional influence on Executive Branch activities as "settled practice."

In Gravel v. United States, 408 U.S. 606 (1972), for example, the Supreme Court concluded that the Speech or Debate Clause of the Constitution did not protect the non-legislative acts of Senator Gravel or his staff aide in connection with the Senator's efforts to have the Pentagon Papers published by a private book-publishing firm. In reaching that result, however, the Court drew some important distinctions that are relevant to our inquiry:

> "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies -- they may conjole, and exhort with respect to the administration of a federal statute -- but such conduct, though generally done, is not protected legislative activity." 408 U.S. at 625 (emphasis added).

Thus, the Court in Gravel conceived of the exertion of congressional influence on Executive Branch activities as part of the normal functions that a legislator carries out in his "official capacity," even though these activities may not be within the core "legislative" acts protected by the Speech or Debate Clause. The Court's language suggests that the Court regards congressional attempts to influence Executive Branch activities as "official acts."

In Doe v. McMillan, 412 U.S. 306 (1973), another Speech or Debate Clause case which followed Gravel, the Court also recognized the frequent involvement of legislators in the execution of federal statutes by the Executive Branch: "Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done is not protected legislative activity.'" Id. at 313 (quoting Gravel v. United States, 408 U.S. at 625).

In United States v. Brewster, 408 U.S. 501 (1972), Senator Brewster was charged with accepting a bribe in violation of 18 U.S.C. § 201(c) and with accepting a gratuity in connection with the performance of an official act in violation of 18 U.S.C. § 201(g).[*] The indictment charged that Brewster, a member of the Senate Committee on Post Office and Civil Service, accepted payments in return for being influenced in his "action, vote, and decision on postage rate legislation." 408 U.S. at 503. The Supreme Court held that the Speech or Debate Clause did not protect a Member of Congress from prosecution for accepting bribes related to legislative functions. The action in question, a Senator's vote on postal rate legislation, clearly related to an "official act" by a legislator; however, in discussing the extent of the protection accorded legislators by the Speech and Debate Clause, the Court recognized that legislators use their public positions to engage in "legitimate" acts in the exercise of their offices that are not "purely legislative activities." 480 U.S. at 512. Like Gravel and Doe v. McMillan, the decision in Brewster implies that normal "official" duties of legislators embrace activities outside the scope of purely legislative work and include influencing Executive Branch decisions.

---

[*] Under 18 U.S.C. § 201(g), a companion to the bribery subsection, public officials are prohibited from accepting gratuities, "otherwise than as provided by law," that are in any way related to the performance of an "official act." The definition of an official act is the same for both subsections (c) and (g).

C. Limitations on the Scope of an "Official Act."

Finally, where the two criteria established by Birdsall are not satisfied, it has been have held that no "official act" is involved and thus that the bribery statute does not apply. In United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979) the defendant served as an Assistant to the Secretary of the Department of Housing and Urban Development; his title was Assistant for Labor Relations. He had accepted payments for promising to promote group automobile insurance in labor union contracts, and was charged with accepting an illegal gratuity. The government argued that the court should "construe the scope of 'official acts' to encompass any acts within the range of an official's public duties, broadly defined . . . ." Id. at 967. In essence, the government asked the court to "construe 18 U.S.C. § 201(g) as a statutory prohibition against the misuse of public office and contacts gained through that office to promote private ends." Id. at 967. The court, however, rejected this broad construction. By focusing on the criteria established in Birdsall, the court found that the HUD official had not accepted payments related to any "official act."

First, the court found that the HUD official did not have the ability to influence governmental decision-making on the subject of group auto insurance:

> "In the instant case there was no evidence that Muntain's meetings with labor officials to discuss and promote group automobile insurance involved a subject which could be brought before Muntain -- or, for that matter, anyone else at HUD -- in an official capacity." Id. at 968.

Second, the court noted that the activities for which Muntain was paid were outside the normal scope of his duties and, consequently, outside the "settled practice" requirement:

> "[I]n the instant case . . . no evidence was introduced to suggest that the responsibilities of the Assistant to the Secretary for Labor Relations at HUD have been expanded by settled practice or otherwise to include meeting with labor union officials concerning group automobile insurance." Id. at 968 n.3.

Muntain illustrates the lines of demarcation that divide the criminal sale of official influence from the non-criminal: the decision to be influenced must be one that lies within the ambit of responsibility of some governmental official. In addition, the official charged must have some ability to affect that decision through the use of his own office.

This analysis suggests that even some promises to influence governmental decision-making may fall outside the bribery statute. Thus, a legislator who accepted a payment in return for a promise to influence the decision of a case by the Judicial Branch of the Government probably would not be guilty of accepting a bribe. Congressmen ordinarily lack any clear ability to influence the decisions of Article III judges, who possess lifetime tenure, and the typical duties of Congressmen do not include exercising such influence. However, circumstances can be conceived in which this conclusion may not apply, such as a legislator's agreeing, in return for a bribe, to file an _amicus curiae_ brief in his official capacity to influence a Court's interpretation of a statute. The conclusion also may not apply to attempts to influence the adjudicative (as well as non-adjudicative) decisions of administrative agencies.

II. Intent Not To Perform Promise To Use Influence.

A related question is whether a public official commits the crime of bribery if he accepts money in return for a promise to use his influence over governmental decision-making but has no actual intent to fulfill his promise. The donor of a bribe is guilty of a crime even if the recipient has no intent to alter his official conduct. _See_ _United States v. Anderson_, 509 F.2d 312 (1974), _cert_. _denied_, 420 U.S. 991 (1975). We conclude that the recipient also is guilty under those circumstances.

The principle case that bears directly on this question is United States v. Arroya, 581 F.2d 649 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979). In that case, Arroya, a loan officer for the Small Business Administration, approved the credit-worthiness of a loan applicant, but two days later falsely represented to the applicant that the application was still pending. Arroya and Sanchez, a business counselor at the Chicago Economic Development Corporation, then solicited a payment in return for the favorable processing of the SBA loan. Arroya and Sanchez were convicted of conspiracy to solicit a bribe in violation of 18 U.S.C. § 371, and Arroya was convicted of corruptly soliciting and receiving a bribe in violation of 18 U.S.C. § 201(c)(1). On appeal, Arroya and Sanchez contended that there could not have been any bribe since § 201(c)(1) "requires that the bribe be paid to influence a future act," and that "one cannot be influenced to do what has already been done." Id. at 654.

The court rejected the defendants' claims. The court emphasized that the statute, by its terms, applies whenever a public official "'corruptly . . . solicits, . . . anything of value for himself . . . in return for being influenced in his performance of any official act.'" Id. at 654. Thus, one evident purpose of the statute is to "prevent corrupt solicitation by government officials." Id. at 654 n.10. Accordingly, the court concluded:

> "Congress did not intend for a public official, who had solicited or encouraged a bribe with a false representation that the official act was in futuro, to escape liability for bribe-solicitation by proving that he had successfully hidden the truth of past performance from the bribe-payer." Id. at 654.

The Court also quoted earlier cases involving the parallel provision, now § 201(b), which prohibits offering bribes. These cases held that the statute is violated whenever a bribe is offered to a public official, whether or not the public official actually performs the act for which the payment is offered, and that the "clear purpose of the statute is to protect the public from the evil consequences of corruption in the public service." Id. at 655 n.12 (quoting this language from United States v. Troop, 235 F.2d 123, 125 (7th Cir. 1956), and Kemler v. United States, 133 F.2d 235, 238 (1st Cir. 1942)).

Discerning a legislative rationale that applies squarely to the issue that we have been asked to address, the court then stated: "The 'consequences of corruption in the public service' are equally evil where, as here, the public official solicits the bribe and the bribe solicitee believes the public official is being influenced." 581 F.2d at 655 n.12 (emphasis in original). Thus, the court concluded that one purpose of the statute is to prevent the corruption that exists when a public official solicits a bribe, whether or not the official intends to be influenced in the actual performance of an official act.

In holding that 18 U.S.C. § 201(c) had been violated, the court focused on the impression that Arroya and Sanchez had created in the mind of the bribe-payer. As viewed by the court, the bribery statute is violated whenever a public official accepts a payment knowing that the impression in the mind of the person paying the money is that the payment is in return for the official's promise to be influenced in the performance of an official act. In upholding the jury instructions given by the trial court, the court explained:

> "The return-for-being-influenced element of the offense was correctly stated by the district court in its jury charge: 'that the defendant Anthony Arroya represented or caused to be represented to Orlando Fernandez that this money was in return for Anthony Arroya's being influenced in his performance of an official act, as that term has previously been defined!" *Id.* at 654 (emphasis added).

Additionally, the court noted that the in-return-for-being-influenced element brings:

> "into play the purpose of the bribe and thus the mind of the bribe-payer. Though more careful draftsmanship might have added 'or apparently being' after 'being,' the section prohibits solicitation of payment 'in return for being influenced.' As illustrated by § 201(c), the gravamen of the offense lies in the corrupt solicitation, which would fail if the solicitee were told the truth." *Id.* at 654 (emphasis added).

Although the court in *Arroya* focused on a corrupt solicitation by a public official, the court's reasoning regarding the required criminal intent must apply equally to the corrupt agreement to accept, or receipt of, something of value by a public official in return for his apparent undertaking -- truthful or not -- to use his official influence over a governmental decision. The official's active misuse of his office by solicitation of a bribe may aggravate the offense, but his awareness of the bribe-giver's impression when the latter has initiated the corrupt bargain satisfies the in-return-for-being-influenced requirement of the bribery statute. Where a public official intends to create or to preserve this impression, the elements of the statute are fulfilled.

The legislative history of the bribery statute strongly supports this conclusion. The various bribery statutes were recodified in 1962. During this process, the House of Representatives explicitly considered the significance of an official's falsely representing a willingness to be influenced in the performance of an official act. The committee report on the bill stated:

> "[T]he language used in subsection (c) emphasizes that *it is the purpose for which the recipient knows the bribe is offered* or given when he solicits, receives, or agrees to receive it *which is determinative* of criminality. Some courts have given this interpretation to the present section 202. (*See*, *e.g.*, *Woelfel v. United States*, 237 F.2d 484, 488; *Whitney v. United States*, 99 F.2d 327, 331.)." H.R. Rep. No. 748, 87th Cong., 1st Sess. pp. 18 (1961) (emphasis added).

Thus, since Congress made controlling the purpose manifested by the bribe-payer, it is immaterial whether the official has the subjective intent to honor the corrupt bargain.

The two cases cited with approval in the House Report are illustrations of this conclusion. In Whitney v. United States, 99 F.2d 327 (10th Cir. 1938), the court upheld the bribery conviction of a government employee at the Osage Indian Agency who had been paid for attempting to influence the approval of a contract involving restricted funds in the custody of the United States. In the section referred to by the House committee report, the court stated:

> "The evidence shows that he not only took but solicited money in connection with said sales, and whether his action was influenced is immaterial. The money was solicited and taken for the purpose of causing the Hahn Brothers Memorial Company to believe that they would get more consideration than they would otherwise." Id. at 331 (emphasis added).

Thus, Whitney stands for the proposition that bribery is determined by the impression that the public official creates or confirms in the mind of the bribe-payer.

In Woelfel v. United States, 237 F.2d 484 (4th Cir. 1956), the court reversed the conviction of an employee of the United States Army Ordinance Corps under a predecessor to § 201 which prohibited any official from soliciting a "gratuity . . . with intent to have his decision . . . in his official capacity . . . influenced thereby." Id. at 485 In that case, the government employee only sought the payment after the official act had been performed, and the individual solicited for the payment knew that the act had been completed. The court found that Woelfel was entitled to have the jury instructed as follows:

> "[T]hat if they believed that the request for a gratuity was not made by the accused until after he had exhausted his power of decision or action on the question or matter before him, and was not made under any prior promise or understanding that a gratuity would be forthcoming, then his request did not constitute a transgression of the statute." Id. at 488.

In Arroya, the defendants argued that the decision in Woelfel established that a public official is not guilty of bribery unless he is taking money in return for actually being influenced in the performance of an official act. 581 F.2d at 656. The majority in Arroya, however, stated the central distinction between the two cases: the bribe-payer in Arroya did not know that the official act had actually been performed and believed, albeit incorrectly, that he was purchasing influence, while the public official in Woelfel only solicited the payment after the potential payer knew that the official act already had been performed. Id.[*] Thus, Woelfel is also consistent with the notion that a violation of 18 U.S.C. § 201(c) is determined by the impression that the bribe recipient creates or confirms in the mind of the bribe-payer about the official's intent to be influenced.

Similarly, in United States v. Manton, 107 F.2d 834 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940), Judge Manton had been convicted of conspiracy to obstruct the administration of justice and to defraud the United States. The court of appeals treated as immaterial his insistence that he had only taken bribes from litigants in whose favor he planned to decide cases and that his decisions had not actually been influenced by the bribes. The court said the "correctness of judicial action" taken for a fee can never remove "the stain of corruption" from such actions. Id. at 846. Thus, the court treated the judge's willingness to accept the payment and to create the impression that justice was for sale as a sufficient basis for culpability.*/

---

[*] These after-the-fact payments are now expressly forbidden under the revised anti-gratuity section, 18 U.S.C. § 201(g).

---

*/It is outside the scope of this memorandum to analyze a distinct question raised by "sting" operations like ABSCAM: If the person making the payment does not intend to call for the actual exertion of influence -- but the official is unaware of this disguised intent -- and if the recipient of the payment secretly harbors an intent to ignore his apparent pledge, has the official solicited or received or agreed to receive something of value "in return for . . . being influenced in his performance of an official act . . ."? This novel issue has not been addressed in prior cases and is, presumably, being litigated in appeals from recent ABSCAM convictions. We note simply the following comments.

The payment and the receipt of a bribe are not interdependent offenses, and the donor's intent may differ from the recipient's. United States v. Anderson, supra, 509 F.2d at 332. Since the statute makes it a crime to "agree" to receive anything of value in return for being influenced, the official's delivery of the pledge may be sufficient, even if neither party subjectively intends to have the pledge honored. In this setting, moreover, the legislator's state of mind is equally corrupt, since he must assume that he has created or confirmed the impression in the mind of the payer that he will be influenced. Thus, this ostensible commitment to be influenced should be sufficient to satisfy both the terms and the purpose of the bribery statute. See generally our discussion in Part III of this memorandum.

III. Doubt That Actual Use Of Influence Will Be Sought.

The final question presented is whether a legislator commits bribery by taking money in return for his promise to use his official influence, if requested to do so, when he has been led to believe that he will not actually be asked to fulfill his commitment. Although we have found no case addressing this precise question, we believe that a legislator violates the statute by selling his office, even if the sale is on a tentative or "stand by" basis.

In one of the ABSCAM cases, United States v. Myers, 635 F.2d 932, 940 (2nd Cir.) cert. denied, 449 U.S. 956, (1980), the court held that the elements of the bribery offense are "the receipt of money, the making of the promise, and the corrupt purpose with which these things are done." See also United States v. Brewster, supra, 408 U.S. at 526-27. All of these elements of the offense are satisfied when a legislator accepts a payment in return for his promise to be influenced in the performance of an official act, even if both the legislator and the bribe-payer believe that the legislator will never be called upon to fulfill his promise. As long as the official creates or confirms the impression that he will use his public position if asked, the bribery offense is complete upon making the promise.

Under the statute, it is immaterial whether the official accepting the bribe actually performs the official act contemplated by the parties. In Brewster, the Court held that "there is no need for the Government to show that [the Senator] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise." 408 U.S. at 526. The Court reiterated: "To make a prima facie case under this indictment, the Government need not show any act of [the Senator] subsequent to the corrupt promise for payment, for it is taking the bribe, not performance of the illicit compact, that is a criminal act." Id. at 526 (emphasis in original). Thus, a violation of the bribery statute is independent of any efforts by the public official accepting the payment to fulfill the corrupt promise. For similar reasons, his expectation that he will not have to redeem a promise actually made cannot be material. In short, an intent not to fulfill the pledge, even if that intent is encouraged by the bribe-giver, is no defense, unless both parties view the promise as merely a sham.

The only element of the offense that could possibly not be satisfied in this situation is "corrupt purpose." However, there is a quid pro quo between receipt of the payment and the pledge of official influence even when a legislator has been led to believe that he will not be called upon to fulfill his promise. So long as he has created or confirmed the impression in the mind of the bribe-payer that he will honor the promise if asked to do so, "corrupt purpose" exists.[*] Congress, in our view, could not have intended otherwise. The creation of the impression that the legislator is "in the pocket" of the person making the payment manifests sufficient intent to violate 18 U.S.C. § 201(c).

Hughes Hubbard & Reed

Of Counsel:

Philip A. Lacovara
Gerald Goldman
Bruce D. Judson

---

[*] We assume that there is no basis to conclude that the payment to the legislator is motivated by anything other than his promise to be influenced in the performance of a specific official act. See, e.g., United States v. Arthur, 544 F.2d 730 (4th Cir. 1976), where the court held that entertaining a government official in the hope of promoting a favorable business climate did not constitute bribery because of the absence of any express or implied condition or *quid pro quo*.

HUGHES HUBBARD & REED
555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071

MEMORANDUM

To: Malcolm E. Wheeler

Date: July 26, 1982

Copies to: William T. Bisset

From: Michael A. Miller

Re: ABSCAM: Analysis of 18 U.S.C.A. Section 201(g).

ISSUES

I. What constitutes an offense under 18 U.S.C.A. § 201(g)?

II. Does a public official who agrees to be influenced in the performance of his official duties in return for something of value, but actually does not intend to be so influenced and intends instead to defraud the donor, violate either 18 U.S.C.A. § 201(c) or § 201(g)?

III. Does a public official who tells the donor "I will be your friend" in return for something of value, but does not promise to do any specific, identifiable act, violate either 18 U.S.C.A. § 201(c) or § 201(g)?

SUMMARY OF CONCLUSIONS

I. A violation of 18 U.S.C.A. § 201(g) occurs when (1) a public official (2) solicits, receives or agrees to receive (3) something of value (4) for himself (5) which is given to the official because of some official act or duty performed or to be performed by the official and (6) which the public official knows is being given to him because he has performed or will perform some official act or duty. The public official, however, need not be motivated to do the act by the gift or offer of something of value. Rather, a violation of section 201(g) occurs even when the public official would have performed the act in any event; all that is required under section 201(g) is that the public official know that the gift of the thing of value is related to his performance or expected performance of an official act.

II. Where the public official has falsely informed a donor that he will be influenced in the performance of his official duties in return for something of value, it is possible that the official has solicited a gratuity in violation of section 201(g). It is doubtful, however, that section 201(c) applies to the official's actions.

III. Where the public official has promised to "be the friend" of a donor in return for something of value, he probably has not violated either section 201(c) or section 201(g).

ANALYSIS

I.

The Elements of the Section 201(g) Offense.

18 U.S.C.A. § 201(g) (West 1969) provides that:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed . . . .
> . . . .
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

This memorandum assumes that such terms as "public official," "solicits, receives or agrees to receive" and "anything of value" are sufficiently defined in the statute and need not be discussed. The following discussion focuses on the section 201(g) culpability requirements.

Section 201(g) has been interpreted as requiring two essential culpability elements. First, the donor must offer or give something of value to the public official because the official has performed or will perform some official act. That is, the official's performance of the act must be the motivation behind the gift or offer. Thus, the donor's intent is an important element under section 201(g). Second, the public official must know, at the time he accepts, solicits or agrees to receive the gift or offer, that the thing of value is proffered because he has performed or will perform a specific official act. Thus, the D.C. Circuit has declared: "[I]f a legislator knew that a contribution was being given for an official act, received the contribution and knowingly applied it to his own uses, the intent requirement of the illegal gratuity section (g) would be met," United States v. Brewster, 506 F.2d 62, 76 (D.C. Cir. 1974) and added that "[u]nder the gratuity section . . . the payment [is] made because of a specifically identified act, and with a certain guilty knowledge [on the part of the official] best defined by the Supreme Court [as] 'Knowledge that the donor was paying him compensation for an official act . . . .'" Id. at 82 (quoting United States v. Brewster, 408 U.S. 501, 527 (1972)). See also United States v. Niederberger, 580 F.2d 63, 69 (3d Cir.) ("What is proscribed [by section 201(g)] is a public official's receipt of a gratuity . . . given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official . . . ."), cert. denied, 439 U.S. 980 (1978); United States v. Passman, 460 F. Supp. 912, 915 (W.D. La. 1978)

("If [a] grateful constituent attaches a note [to a gift of something of value] saying this is for your vote which you cast last week in favor of our labor bill which was pending before you, then [a violation of] subsection (g) [occurs].").

A. The Donor's Intent

As noted above, section 201(g) requires that the donor give or offer something of value "for or because of" the official's past or expected performance of an official act. It is uncertain, however, what relationship must exist between the performance of the act and the giving of the gift. Is section 201(g) violated only when the performance is the sole motivation for the gift? Is it enough that the gift would not be given but for the performance? Or is it sufficient that the role of the performance in motivating the gift is minimal (i.e., the gift would be given regardless of the official's performance, but the donor also believes--and lets the donee know--that the gift is a reward for the performance of an act)?

If the purpose of section 201(g) "is to reach any situation in which the judgment of a government agent might be clouded because of payment or gifts made to him by reason of his position," United States v. Evans, 572 F.2d 455, 480 (5th Cir.), cert. denied sub nom., Tate v. United States, 439 U.S. 870 (1978), then it appears that the statute should require a "but for" connection between the gift and official act. Where the gift would be made regardless of the act, but is nevertheless intended to be, among other things, a reward for the act, the possibility of corruption is minimal, since the official knows he would receive the gift by doing nothing. Where the gift would not be given but for the official act, the danger that the gratuity of today could become the bribe of tomorrow appears much greater. *But cf.* *United States v. Irwin*, 354 F.2d 192 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966):

> The awarding of gifts . . . *related* to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees, consciously or unconsciously, for those who give gifts as distinguished from those who do not.

Irwin, 354 F.2d at 196 (emphasis added). The *Irwin* court appears to say that so long as the gift and the official act are "related," the receipt of the gift is forbidden by section 201(g). Thus, while a "but for" standard may adequately serve the statute's purposes, the *Irwin* decision indicates that a broader standard may apply.

B. The Donee's State of Mind

Under section 201(g), it is not necessary that the public official be influenced or agree to be influenced in return for the gift or offer. It is enough that the official know that the gift or offer is made only because of the official's past or future performance on an official matter.[1] That is the tenor of the cases distinguishing section 201(g) from section 201(c), which forbids the acceptance or solicitation of bribes. See e.g., Brewster, 506 F.2d at 72 ("The bribery section makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity. . . ."); United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978) ("[T]he element of quid pro quo . . . distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple mens rea required for violation of the gratuity sections."). Cf. United States v. Alessio, 528 F.2d 1079, 1082 (9th Cir.) ("Section 201(f) [the companion section to (g)] has consistently been interpreted as not requiring a quid pro quo before payments to officials are unlawful."), cert. denied, 426 U.S. 948 (1976).[2]

1/ No violation of section 201(g) occurs unless the public official accepts or solicits the gift or offer for himself. Thus, a donor may contribute to a campaign committee because the official has performed an official act and where the committee is not a "mere conduit" for the official. Brewster, 506 F.2d at 77, 81.

2/ It appears, however, that a quid pro quo element may exist in a section 201(g) offense that does not also constitute a section 201(c) offense. Thus, Brewster held that section 201(c) does not prohibit the acceptance of a bribe unless the bribe is the "prime mover or producer" of

Therefore, a public official may receive something of value beyond his legally established compensation if the gift was unrelated to any specific official act he has performed. Brewster, 506 F.2d at 77. Thus, acceptance of a gift made because of friendship or some other reason unrelated to the official actions of the donee does not constitute a violation of section 201(g).

C. Gifts Motivated By Status

Section 201(g) clearly forbids officials to accept gifts for specific official acts. Brewster at 82; Passman at 915. It is unclear, however, whether an official violates section 201(g) if he accepts something of value that he knows is given in relation to his status as a public official. In United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976), the defendant was charged with improperly using bank funds in violation of 18 U.S.C.A. § 656 (West 1976) because he expended such funds on the entertainment of government officials. The federal government contended these payments violated West Virginia laws prohibiting bribery. The defendant argued that such entertainment was a lawful method of cultivating the goodwill

---

2/ (Cont'd)
the official act. 506 F.2d at 82. Where the bribe is taken as a quid pro quo for influence over the performance of an official act, but the bribe plays a negligible role in influencing the official's decision, it appears Brewster and subsequent cases would find a violation of section 201(g), but not of section 201(c).

of the government, a potential customer of his business. The Fourth Circuit, construing the West Virginia statutes in light of the Brewster decision, agreed with the defendant, stating that

> [i]t does not follow . . . that the traditional business practice of promoting a favorable business climate by entertaining and doing favors for potential customers becomes bribery merely because the potential customer is the government. Such expenditures, although inspired by the hope of greater government business, are not intended as a quid pro quo for [or because of] that business; they are in no way conditioned upon the performance of an official act or patter of acts . . . .

Arthur, 544 F.2d at 734. The Court also found that West Virginia law specifically categorized such expenditures as lawful gratuities. Arthur, 544 F.2d at 735 n.8. While the Arthur court was not faced with the question of whether such "goodwill" gratuities were unlawful under section 201(g), its analysis seems equally applicable to that statute. Section 201(g) forbids only knowing acceptance of gifts motivated by specific acts, not knowing acceptance of gifts motivated by the official's status. It is difficult to discern a clear line between gifts given to cultivate goodwill and gifts given because of a specific act done by the public official. Presumably, the line is crossed when the donee becomes aware of some identifiable act for which the gift or offer is made.

My impression is that section 201(g) should be extended to gifts given because of an official's status. The line between status and the performance of official acts is sufficiently thin that the purposes of the act might be frustrated if such "goodwill" payments are excluded. "[T]he unlawful gratuity statute . . . must be broadly construed in order to accomplish the legislative purpose which they manifest." Evans, 572 F.2d at 480. The Arthur decision indicates, however, that "goodwill" gratuities are not unlawful.

In summation, a violation of section 201(g) occurs when a public official (1) accepts or solicits for himself a gift or offer of something of value that has some relation to the official's actual or expected performance of some official act and (2) knows that the gift or offer has some relation to his actual or expected performance. Unlike the bribery section, 201(c), however, there is no requirement that the official be influenced in performing his official duties by the gift or offer. Finally, section 201(g) does not prohibit officials from receiving gifts motivated by friendship or a desire to cultivate the official's goodwill.

II.

The Case of the Defrauding Official

Suppose a public official solicits a gift or offer of something of value and in return promises to be influenced in the performance of some specific act. Actually, however, he does not intend to be so influenced. Rather, he intends to "defraud" the donor by accepting the emolument he has solicited without performing the act. Under these circumstances, has the official violated either section 201(c) or section 201(g)? The answer appears to be that the official is guilty of a violation under section 201(g), but not under section 201(c).

A. Section 201(g)

Under the hypothetical outlined above, the official has solicited a gift of something of value for himself, which he knows will be offered him only because he will perform specific official acts. Thus, the elements of an offense under section 201(g) apparently are present.

B. Section 201(c)

Section 201(c) differs from section 201(g) in that it forbids a public official to "corruptly . . . solicit . . ., receive . . . or agree . . . to receive anything of value for himself or any other person or entity, in return for . . . being influenced in his performance of any official act." 18 U.S.C.A. § 201(c)(1) (West 1969) (emphasis added). "The elements of the offense are [(1)] the receipt of money, [(2)] the making of the promise [to be influenced], and [(3)] the corrupt purpose with which these things are done." United States v. Myers, 635 F.2d 932, 940 (2d Cir.) (citing United States v. Brewster, 408 U.S. 501, 526-27 (1976)) cert. denied, 449 U.S. 956 (1980). In the hypothetical, elements (1) (the receipt of money) and (2) (the promise to be influenced) are present. The issue is whether a "corrupt purpose" exists.

The term "corruptly" was initially defined in United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974). The Brewster court held that the term "corruptly" embodied the concept of a quid pro quo, 506 F.2d at 72 (i.e., that "the bribe [must be] the prime mover or producer of the official act." 506 F.2d at 82). In other words, a violation of section 201(c) occurs when a public official intends to exchange influence over himself in the performance of official acts in return for something of value. See also United States v. Raborn, 575 F.2d 688, 692 (9th Cir. 1981) ("Under section 201(c), the public official [must] . . . receive the item of value as compensation for services . . . as a quid pro quo in return for influence. . . ."). Accord, Strand, 574 F.2d at 995; Niederberger, 580 F.2d 68-69; Arthur, 544 F.2d 734. It is uncertain, however, how much influence must be purchased before a gift or offer of something of value becomes a bribe under section 201(c). Brewster's "prime mover" language appears to allow for the possibility that where an official agrees to exchange influence over himself in return for something of value, but would likely or certainly have performed the act sought by the donor in any case, no violation of section 201(c) occurs.

In the hypothetical, the official has no actual intent to be influenced. Thus, no quid pro quo exists. In

United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979), however, the Seventh Circuit extended the application of section 201(c) to instances where the public official acts in manner that he intends falsely will lead the donor to believe that the official intends to exchange influence over himself in return for something of value.

In Arroyo, Fernandez applied to the SBA for a loan. Arroyo, an SBA loan officer, approved Fernandez' loan application but did not apprise Fernandez of his action. Instead, Arroyo (through his agent Sanchez) informed Fernandez that he had still not approved the loan and that a payment of $800 would be "convenient or better" for all concerned. Arroyo later received $800 from Fernandez.

Arroyo challenged his conviction under section 201(c) by arguing that that section applies only to situations where the public official agrees to be influenced in his future acts. The Seventh Circuit rejected Arroyo's arguments, stating that:

> The bribe solicitor will always create the impression that the action sought is yet to come and is contingent on the bribe. The solicitation against which the section is directed is the same, whether the yet-to-come impression be objectively true or false.

Arroyo, 581 F.2d at 655. The court apparently believed that section 201(c) punishes transactions where the official acts in a manner that he intends will lead the donor to believe that the gift or offer of something of value will be the "prime mover" of the official's actions, even when the official has no actual intent to be so influenced. Thus,

> [w]hether the solicitation [of something of value in exchange for influence over the official's performance of official acts] succeed or fail, and whether the official act had been secretly performed, cannot change what was solicited. . . . The view that § 201(c)(1) merely seeks to shield [sic] decisions resulting from influence would appear to create an absolute defense for an official, who solicits a bribe before he acts, but who can prove his decision was not influenced because he would have made the decision in any event. . . .

Arroyo, 581 F.2d at 654-55 n.10.

The Arroyo court's interpretation of 201(c) is supported by the statute's legislative history:

> [T]he language used in subsection (c) emphasizes that it is the purpose for which the recipient knows the bribe is offered or given when he solicits, receives or agrees to receive it which is determinative of criminality.

H.R. Rep. No. 748, 87th Cong., 1st Sess. 18 (1961). The Report appears to say that a violation of section 201(c) occurs when the official merely has knowledge that a gift or offer of something of value is proffered in exchange for influence over the official's performance and when the official solicits, receives or agrees to receive the gift or offer. The Report cited Whitney v. United States, 99 F.2d 327 (10th Cir. 1938) in support of its position. In Whitney, the defendant challenged his bribery conviction (under former section 202) on the grounds that (1) he was not influenced by receipt of the bribe and (2) he could not be influenced by receipt of the bribe because he was powerless to effectuate his promise to be influenced. The court rejected the argument that his lack of intent to be influenced exonerated him from the charge of bribery:

> The evidence shows that he not only took but solicited money in connection with said sales, and whether his action was influenced is immaterial. The money was solicited and taken for the purpose of causing the [donors] to believe that they would get more more consideration than they would otherwise.

Whitney, 99 F.2d at 331.

The clear import of the House Report, however, is that a violation of section 201(c) occurs where the official has knowledge that an offer or gift of something of value is a bribe. See also Howard v. United States, 345 F.2d 126, 129 (1st Cir.) (relying on Whitney and other cases to interpret the Anti-Kickback Statute, 41 U.S.C.A. §§ 51, 54 (West 1965), "basically the same as . . . 18 U.S.C. § 201," as forbidding acceptance of a bribe with knowledge of the donor's intentions), cert. denied, 382 U.S. 838 (1965). Moreover, under Arroyo, it seems that knowing acceptance of a bribe would be sufficient to show an intent on the part of the official to mislead. This interpretation of section 201(c), however, conflicts with the quid pro quo requirement enunciated in Brewster. The Brewster line apparently rejects the idea that an official is guilty under section 201(c) merely for accepting what he knows is intended as a bribe.

> The payment and the receipt of a bribe are not interdependent offenses, for obviously the donor's intent may differ completely from the donee's. Thus, the donor may be convicted despite the fact that the recipient had no intention of altering his official activities . . . .

Anderson, 509 F.2d at 332. As the Ninth Circuit said in United States v. Strand, 574 F.2d 993, 995, 996 (9th Cir. 1978), "[The] element of quid pro quo . . . distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple means required for violation of the gratuity sections." The court also declared that "the requisite corrupt intent consist[s] of the defendant's knowing acceptable of money for financial gain, in return for violation of his official duty, with the specific intent to violate the law.". See also United States v. Anderson, 509 F.2d 312, 329 (D.C. Cir. 1974) ("Proof of the offense of bribery involves proof . . . of corrupt intent to . . . be influenced in official conduct."), cert. denied, 420 U.S. 991 (1975). Under Brewster, a specific intent to be influenced apparently is required; mere knowledge of the donor's purpose is insufficient to render the official guilty under section 201(c). Of course, the hypothetical presupposes active misrepresentation, as opposed to silence. It is doubtful, however, that section 201(c) will be applied to facts like those in the hypothetical. Of course, this depends on how the courts resolve the apparent contradictions between Brewster and Arroyo.

C. Public Policy

Public policy supports the Arroyo court's interpretation of section 201(c). The court explained its decision thus:

> [The court in Kemler v. United States, 133 F.2d 235 (1st Cir. 1942), in describing the predecessor of section 201(b)'s (which forbids the giving or offering of bribes), stated that] "[t]he clear purpose of the statute is to protect the public from the evil consequences of corruption in the public service. Thus the gravamen of the offense described therein is the giving or offering of a bribe to a person acting on behalf of the United States for the purpose of influencing official conduct. Obviously no one would give or offer a bribe unless he expected to gain some advantage thereby, and since attempting to gain an advantage by this means is the evil which this statute is designed to prevent, it can make no difference if after the fact is done the doer discovers that for some reason or another, be it a mistake on his part or mistake on the part of some officer or agency of the United States, there was actually no occasion for him to have done it." [Kemler,

> 133 F.2d at 238.] The "consequences of corruption in the public service" are equally evil where, as here, the public official solicits the bribe and the bribe solicitee believes the public official is being influenced.

Arroyo, 581 F.2d at 655 n.12. Because Congress has indicated, by its gradation of punishments for 201(c) and 201(g), that the acceptance of bribes is more offensive than the acceptance of gratuities, it is possible to argue that even an insincere solicitation of bribes is a greater evil than mere knowing receipt of what the donor intends as a bribe. That is so because in theory the official who solicits bribes more likely will encourage the giving of bribes than the official who indicates that he will not be influenced thereby. Thus, the penalty for falsely soliciting a bribe should be as great as the penalty for an actual agreement to be influenced. If the policy of discouraging the offering of bribes is to have any meaning, solicitation of a bribe under false pretences should be unlawful under section 201(c), which provides a greater penalty than does section 201(g).

III.

The Case of the Friendly Official.

Suppose an official informs a donor that, in return for something of value, "I will be your friend." Does the official thereby violate either section 201(c) or section 201(g)? The answer appears to be that the official has not violated either section.

A. Section 201(c)

Statements as "I will be your friend," "I will take care of you" and "When you need something, I'll see what I can do" are ambiguous. They carry the implication that what is promised is the performance of some sort of official duties.

These statements appear too nebulous, however, to violate the bribery statute. Most courts hold that section 201(c) requires the presence of "specific knowledge of a definite official act," Brewster, 506 F.2d at 81. Section 201 defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official." It does not appear that a promise to be "friendly" amounts to being influenced on a particular matter. In United States v. Arthur, 544 F.2d 730 (4th Cir. 1976), the court held that section 201(c) forbids the giving of gifts to influence officials even when no identifiable relationship exists between any one gift and any one official act:

> [The] requirement of criminal intent would, of course, be satisfied if the jury were to find a "course of conduct

> of favors or gifts flowing" to a public official in exchange for a pattern of official actions favorable to the donor even though no particular gift or favor is directly connected to any particular official act. [quoting United States v. Baggett, 481 F.2d 114, 115, (4th Cir.), cert. denied, 414 U.S. 1116 (1973)]. . . . Moreover, as the Seventh Circuit has held, it is sufficient that the gift is made on the condition "that the offeree act favorably to the offeror when necessary."

Arthur, 544 F.2d at 734 (quoting United States v. Isaacs, 493 F.2d 1124, 1145 (7th Cir.), cert. denied, 417 U.S. 976 (1974)).

In Arthur, however, there was at least a series of gifts that could be casually linked to a series of acts. Where the official merely promises to "take care" of the donor, the casual nexus does not seem so well-defined. If the official later acts in response to the gift, then he has been bribed. At the time he receives the gift, however, the official's response appears too uncertain to impose liability. I am not certain that a promise to be "friendly" amounts to a promise to act favorably to the donor on all future official acts. I believe, however, that it should not matter whether the "official duties" involve an identified act or merely refer to the multitude of various services which an official would ordinarily provide to the public. In the case of a congressman, of course, such duties presumably include hearing out and aiding constituents. The official receives the payments only because of his status as a public official. It appears that such payments have the potential for producing corruption and to allow such payments appears to frustrate the purposes of the statute.

B. Section 201(g)

The hypothetical apparently also does not present a violation of section 201(g), for the same reasons that section 201(c) is not violated. The official's response appears so vague or noncommital that it is impossible to say that the response involved a promise to do official acts or that the donor understood that he was receiving more than a promise to keep an open mind (i.e., that the promise was meaningless). However, "the unlawful gratuity [and bribery] statute[s] must be broadly construed in order to accomplish the legislative purpose which they manifest." Evans, 572 F.2d at 480 (footnote omitted). "The purpose of the statute[s] is to reach any situation in which the judgment of a government agent might be clouded because of payments or gifts made to him by reason of his position. . . ." Evans, 572 F.2d at 480 (emphasis added). Under the circumstances of the hypothetical, the official receives the payment solely because of his position. In light of the stated purposes of the statute, it appears that Congress should forbid such payments. It does not appear, however, that the statute, as currently written and applied, presently bars the type of transaction presented in the hypothetical.

Hughes Hubbard & Reed
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
TELEPHONE: 202-626-6200
TELEX: 892674

ONE WALL STREET
NEW YORK, NEW YORK 10005
212-943-6500

47, AVENUE GEORGES MANDEL
75016 PARIS, FRANCE
553-9901

555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071
213-489-5140

111 EAST WISCONSIN AVENUE
MILWAUKEE, WISCONSIN 53202
414-271-6827

August 26, 1982

Memorandum for the United States Senate
Select Committee to Study Law Enforcement
Undercover Activities of Components of
the Department of Justice

The Application of the Hobbs Act, the Travel Act, and the Mail Fraud Statute to Legislators Who Solicit or Accept Bribes

This memorandum responds to the following questions raised in the agreement dated June 15, 1982, between the Select Committee and this Firm.

QUESTIONS

1. If a legislator personally accepts a payment of cash in return for his promise to cause some branch of the United States Government to cause a specified event or circumstance to occur, is that legislator guilty of extortion as defined within the Hobbs Act, 18 U.S.C. § 1951, even if the legislator has no intent to fulfill his promise and has fraudulently induced the payment to him?

2. If a legislator personally accepts a payment of cash in return for his promise to cause some branch of the United States Government to cause a specified event or circumstance to occur, is that legislator guilty of violating the Travel Act, 18 U.S.C. § 1952, even if the legislator has no intent to fulfill his promise and has fraudulently induced the payment to him?

3. If a legislator personally accepts a payment of cash in return for his promise to cause some branch of the United States Government to cause a specified event or circumstance to occur, is that legislator guilty of violating the Mail Fraud Statute, 18 U.S.C. § 1341, even if the legislator has no intent to fulfill his promise and has fraudulently induced the payment to him?

SUMMARY OF CONCLUSIONS

1. A legislator who, under color of office, personally accepts a payment of cash in return for his promise to cause some branch of the United States Government to cause a specified event or circumstance to occur is guilty of extortion as defined within the Hobbs Act, even if the legislator has no intent to fulfill his promise and has fraudulently induced the payment to him, provided that his conduct affects commerce.

2. A legislator who personally accepts a payment of cash in return for his promise to cause some branch of the United States Government to cause a specified event or circum-

stance to occur is guilty of violating the Travel Act, even if the legislator has no intent to fulfill his promise and has fraudulently induced the payment to him, provided that he travels or uses facilities in interstate commerce to facilitate the solicitation or acceptance of the payment.

3. A legislator who personally accepts a payment of cash in return for his promise to cause some branch of the United States Government to cause a specified event or circumstance to occur is guilty of violating the mail fraud statute, even if the legislator has no intent to fulfill his promise and has fraudulently induced the payment to him, provided that he uses the mails to facilitate the solicitation or acceptance of the payment.

DISCUSSION

I. The Hobbs Act

The Hobbs Act, 18 U.S.C. § 1951(a), provides:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." (Emphasis added.)

The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2)(emphasis added).

The "under color of official right" language of the Hobbs Act reflects the common law definition of extortion. At common law, extortion consisted solely of a public official's corrupt taking of an unauthorized fee under color of his office and did not require proof of threat, fear or duress. Thus, the essence of the offense was accepting a fee not authorized by law for performance of an official duty. Threats, fear or duress became express elements of the crime of extortion only when the crime was expanded to include actions by private individuals who had no official power to wield over their victims. *See United States v. Nardello*, 393 U.S. 286, 289 (1969); *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); *United States v. Butler*, 618 F.2d 411, 418 (6th Cir. 1980), *cert. denied*, 447 U.S. 927 (1980), 449 U.S. 1089 (1981). As a consequence, these elements are not necessary elements of a charge under the Hobbs Act that a public official has engaged in extortion. The misuse of public office, in itself, in order to acquire fees not authorized by law constitutes implicit coercion. *See United States v. Hathaway*, *supra*, 534 F.2d at 393; *United States v. Butler*, *supra*, 618 F.2d at 418.

Indeed, a public official is guilty of extortion in violation of the Hobbs Act even if he does not initiate a demand for the payment under threat of official action; thus, bribery and extortion under color of office are not mutually exclusive. In United States v. Hedman, 630 F.2d 1184 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981), for example, the government proved that defendants, city building inspectors, accepted money from builders who failed to conform to the building code, but the government did not show that the inspectors actually solicited the payments. The court rejected the defendants' arguments that the government had to show that the officials were the "initiators" or "inducers" of the alleged payments and that only "bribery rather than extortion was established." 630 F.2d at 1194-95. The court stated:

> "[i]t is settled law in this Circuit as well as others that in a Hobbs Act prosecution for extortion under color of official right it is unnecessary to show that the defendant induced the extortionate payment . . . . The government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained only because of his official position." 630 F.2d at 1195 (emphasis added).

See also United States v. Jannotti, 673 F.2d 578, 595 (3rd Cir. 1982), cert. denied, 50 U.S.L.W. 3961 (1982); United States v. Butler, supra, 618 F.2d at 418; United States v. Harding, 563 F.2d 299, 305, 307 (6th Cir. 1977); United States v. Hathaway, supra, 534 F.2d at 393; United States v. Brown, 540 F.2d 364, 372 (8th Cir. 1976); United States v. Hall, 536 F.2d 313, 321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); United States v. Mazzei, 521 F.2d 639, 643 (3rd Cir.), cert. denied, 423 U.S. 1014 (1975); United States v. Trotta, 525 F.2d 1096, 1098-1099 (2d Cir. 1975); United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

The applicable standard for determining whether a payment is sought or obtained "under color of official right" is whether the motivation for the payment turns on the recipient's office. This standard encompasses the passive acceptance of bribes by public officials. See United States v. Butler, supra, 618 F.2d at 418 ("a showing that the motivation for the payment focuses on the recipient's office, regardless of who induces the payments, is sufficient to convict under the Hobbs Act"); United States v. Hedman, supra, 630 F.2d at 1195 ("'It matters not whether the public official induces payments . . . So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951'") (quoting United States v. Braasch, supra, 505 F.2d at 151).

Thus, we conclude that a legislator would satisfy all of the relevant elements of the Hobbs Act if he uses his governmental position to solicit or accept an unauthorized payment related to the performance of his official duties, even if he has misled the payor about his intent. If the activity in question falls within the range of functions he may perform in his official capacity, the solicitation or receipt of a fee not prescribed by law for performing the activity is "under color of offical right." See, e.g., United States v. Hall, supra, 536 F.2d at 320-21; United States v.

Hathaway, supra, 534 F.2d at 393-94. His subjective motives and intent concerning actual performance of the activity are not material. What is controlling is that he solicits or accepts the unauthorized payment in his capacity as a public official.

Finally, a violation of the Hobbs Act requires that the extortionate conduct "affects commerce . . . ." 18 U.S.C. § 1951(a). We have not been asked to discuss the situations in which a legislator's fraudulent promise to influence governmental action would satisfy this element of the Hobbs Act. We note, however, that the Supreme Court has ruled that Congress intended in enacting the Hobbs Act to assert the maximum coverage available to it under the Commerce Clause of the Constitution. Stirone v. United States, 361 U.S. 212, 215 (1960). Accordingly, the lower courts have repeatedly held that even the potential for a de minimis effect on commerce is sufficient to make the extortionate conduct subject to prosecution. See, e.g., United States v. Glynn, 627 F.2d 39, 41 (7th Cir. 1980); United States v. Phillips, 577 F.2d 495, 501 (9th Cir.), cert. denied, 439 U.S. 831 (1978).

II. The Travel Act

The Travel Act, 18 U.S.C. 1952(a), provides:

> "Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --
>
> (1) distribute the proceeds of any unlawful activity; or

> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both." (Emphasis added.)

The Act defines "unlawful activity" as "extortion, bribery, or arson in violation of the laws of the State in which commited or of the United States." 18 U.S.C. § 1952(b)(2).

The conduct described in the question posed to us would satisfy both the extortion and the bribery predicates of the Travel Act. As we discussed in our Memorandum for the Select Committee entitled "The Application of the Federal Bribery Laws to the Conduct of Legislators," dated July 19, 1982, a legislator who accepts a payment in return for a promise to influence a governmental action is guilty of accepting a bribe in violation of 18 U.S.C. § 201(c), even if the legislator has no intent to fulfill his promise. See, e.g., United States v. Arroyo, 581 F.2d 649, 654-55 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979). In addition, as discussed in Point I above, a legislator who solicits or accepts a payment under those circumstances is also guilty of the federal offense of extortion in violation of 18 U.S.C. § 1951 if his conduct affects commerce. Since the Travel Act incorporates these two offenses, legislators who travel in interstate commerce or utilize interstate facilities in order to promote these offenses are, therefore, also guilty of violating the Travel Act, 18 U.S.C. § 1952.

III. The Mail Fraud Statute

The Mail Fraud Statute, 18 U.S.C. § 1341, provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Emphasis added.)

For the government to establish a violation of the mail fraud statute, it must prove "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." Pereira v. United States, 347 U.S. 1, 8 (1954).

Generally, the courts have broadly construed the words "scheme or artifice to defraud." As a result, this term has come to encompass schemes involving deception that employ the mails and are contrary to public policy or violate accepted moral standards and notions of honesty and fair play.

See Edwards v. United States, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972). As one court has put it:

> "The aspect of the scheme to 'defraud' is measured by [a] nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958).

See also United States v. Mandel, 591 F.2d 1347, 1360 (4th Cir. 1979), vacated on other grounds, 602 F.2d 653 (4th Cir. 1979) (en banc) (per curiam), cert. denied, 445 U.S. 961 (1980).

Under this test, the deceitful conduct of a legislator posed in the third question would involve the dishonest endeavor to obtain money by artifice. If the mails are used in any way in carrying out the scheme, the conduct would fall squarely within the terms of the statute.

Moreover, it is now well established that the mail fraud statute can be violated even where the deceptive scheme is not intended to defraud individuals of money or other tangible property. See United States v. Brown, supra, 540 F.2d at 374; United States v. States, 488 F.2d 761, 764-66 (8th Cir. 1973), cert. denied, 417 U.S. 909, 950 (1974); United States v. Mandel, 415 F. Supp. 997, 1011 (D. Md. 1976), aff'd by equally divided court, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied., 445 U.S. 961 (1980); United States v. Isaacs, 493 F.2d 1124, 1149-50 (7th Cir.), cert. denied, 417 U.S. 976 (1974); Shushan v. United States, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941). A deceptive scheme violates the statute if it operates to deprive individuals of significant intangible rights or interests. United States v. Isaacs, supra, 493 F.2d at 1149-50; United States v. George, 477 F.2d 508, 512-13 (7th Cir.), cert. denied, 414 U.S. 827 (1973).

Applying these standards, a number of cases have extended the coverage of the mail fraud statute beyond private attempts to cheat other individuals out of their property, tangible or intangible. They have recognized that every citizen has a right to have his government conducted honestly and that this right is "something of value" whose corrupt deprivation may fall within the meaning of "scheme to defraud." E.g., United States v. Mandel, supra, 415 F. Supp. at 1013; Shushan v. United States, supra; Bradford v. United States, 129 F.2d 274 (5th Cir. 1942); United States v. Isaacs, supra, 493 F.2d at 1150. These cases have reasoned that such schemes deprive the public of the proper "performance of the fiduciary duties of the public official" and his "loyal and faithful services." United States v. Mandel, supra, 415 F. Supp. at 1013.

The cases under the mail fraud statute are similar to decisions holding that the prohibition in 18 U.S.C. § 371 against conspiracies "to defraud the United States" reaches not only schemes to obtain money illegally, "but also 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government'."

United States v. Johnson, 383 U.S. 169, 172 (1966) (allegedly corrupt efforts by Congressman to influence Department of Justice in return for campaign contributions and legal fees), quoting Haas v. Henkel, 216 U.S. 462, 479 (1910). Since the people of the United States have a right to expect their government to function honestly, this "conspiracy to defraud" statute protects the "integrity" of the government by prohibiting conspiracies to pervert the governmental process. See, e.g., United States v. Burgin, 621 F.2d 1352, 1356 (5th Cir.), cert. denied, 449 U.S. 1015 (1980); United States v. Haldeman, 559 F.2d 31, 120-122 (D.C. Cir. 1976) (en banc), cert. denied, 431 U.S. 933 (1977); United States v. Moore, 173 F. 122 (9th Cir. 1909).

Schemes involving the bribery of public officials are encompassed by this reasoning, even when the public official does not intend to deliver on his promise. The deliberate creation of the impression that the transaction will corruptly affect the governmental process defrauds the public of its right to have the legislative process free of taint, the ostensible sale of governmental influence.

It does not matter that, on the assumptions given, the payment will not actually lead to any attempt to influence governmental action. Public officials accepting bribes have been found guilty of violating the mail fraud statute even where their activities did not lead to any identifiable harm. For example, in Shushan v. United States, supra, the court upheld the mail fraud prosecution of a member of a Louisiana parish levee board for receiving kickbacks from the underwriters of a plan to refund outstanding bonds of the levee district. The defendant argued that no actual fraud had occurred since the refunding operation was actually profitable to the levee board. Nonetheless, the court found that a "scheme to defraud" existed. The court stated: "No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an [sic] one must in the federal law be considered a scheme to defraud." 117 F.2d at 115. The court went on to note the "essential immorality" of such schemes. Id.

Subsequently, in United States v. States, supra, the Eighth Circuit favorably reviewed Shushan and agreed that "a scheme to gain personal favors from public officials is a scheme to defraud the public, although the interest lost by the public can be described no more concretely than as an intangible right to the proper and honest administration of government." 488 F.2d at 766.

Therefore, we conclude that a "scheme to defraud" exists where a legislator accepts a payment in return for a promise to influence governmental action and one party utilizes the mails as part of the corrupt deal, even if the legislator has no intent to fulfill his promise. Such an official, who is guilty of bribery in violation of 18 U.S.C. § 201(c) and perhaps of extortion in violation of 18 U.S.C. § 1952, violates his fiduciary duty to provide "honest, faithful and disinterested service" to the taxpayers. *United States v. Mandel*, *supra*, 591 F.2d at 1362. *See* *United States v. Brown*, *supra*, 540 F.2d at 374-375. When a legislator uses his office for private gain, he undermines "the proper and honest administration of government." *See* *United States v. States*, *supra*, 488 F.2d at 766. His deliberate involvement in such a scheme defrauds the public of its right to expect that a legislator will neither sell his influence nor promise to sell it.

Hughes Hubbard & Reed

Of Counsel:

Philip A. Lacovara
Gerald Goldman
Bruce D. Judson

APPENDIX F

SELECTED CASES OF CRIMINAL PROSECUTIONS OF MEMBERS OF CONGRESS, 1798-1981

Rep. Robert E. Bauman, 1973-1980

Following a complaint registered by a District of Columbia police officer, an FBI investigation reported that Rep. Bauman had had sexual encounters with male juveniles. On October 3, 1980, Rep. Bauman was charged with soliciting sex from a minor. On that date Rep. Bauman pleaded not guilty in the District of Columbia Superior Court. On March 31, 1981, charges against Mr. Bauman were dropped after he had successfully completed a six-month first offender and alcohol rehabilitation program. (Washington Star, Oct. 3, 1980, pp. A1, A8, Washington Post, Apr. 3, 1981, p. B3.)

Rep. Frank W. Boykin, 1935-1963

On October 16, 1962, Rep. Boykin was indicted for violating 18 U.S.C. § 281 (conflict of interest) and 18 U.S.C. § 371 (conspiracy to defraud the Government). The indictment alleged that Rep. Boykin had attempted to influence the Department of Justice to dismiss indictments against a Maryland savings and loan association for mail fraud charges. (See Rep. Thomas F. Johnson, below). Rep. Boykin was convicted in Federal district court in Baltimore on June 13, 1963. On October 7, Rep. Boykin was placed on six months' probation and fined $40,000. He was pardoned by President Lyndon Johnson on December 17, 1965. (38 Cong. Quart. Weekly Rept. 341 (Feb. 9, 1980).)

Rep. Ernest K. Bramblett, 1947-1955

On June 17, 1953, Rep. Bramblett was indicted on eighteen counts of making false statements in violation of 18 U.S.C. § 1001 (1952). The indictment charged that Rep. Bramblett had misrepresented a person as being a clerk on his staff who turned her salary over to Rep. Bramblett. On February 9, 1954, Rep. Bramblett was convicted on seven counts and acquitted of eleven in the Federal District Court for the District of Columbia. The court stayed sentencing pending the construction of "department or agency" as used in 18 U.S.C. § 1001 (U.S. v. Bramblett, 120 F. Supp. 857, D.C.D.C. 1954; rev'd, 348 U.S. 503 (1955)).

On June 15, 1955, Rep. Bramblett received a suspended sentence of four-to-twelve-months imprisonment and a fine of $5,000. On January 19, 1956, the Court of Appeals held that prosecution of Rep. Bramblett was not barred by the statute of limitations (Bramblett v. U.S., 231 F.2d 489, D.C. Cir. 1956; cert. den., 350 U.S. 1015 (1956)).

Rep. Frank J. Brasco, 1967-1975

Rep. Brasco was indicted on October 23, 1973, for conspiracy (18 U.S.C. § 371) to violate the bribery statutes (18 U.S.C. §§ 201, 203). Rep. Brasco had allegedly conspired to receive bribes from an individual who sought truck-leasing contracts from the U.S. Postal Service as well as loans to buy trucks. On July 19, 1974, Rep. Brasco was convicted in the Federal District Court for the Southern District of New York and, on October 22, sentenced to five years imprisonment (of which all but three months were suspended) and fined $10,000. Motion for a new trial because of improper jury sequestration was denied on November 22, 1974 (*U.S. v. Brasco*, 385 F. Supp. 966 (S.D.N.Y. 1974); *aff'd*, 516 F.2d 816 (2d. Cir. 1975); *cert*. *den*., 423 U.S. 860 (1975)).

Rep. Walter E. Brehm, 1943-1953

On December 20, 1950, Rep. Brehm was indicted on seven counts of violating 18 U.S.C. § 208, prohibiting a Member of Congress from accepting political contributions from government employees. The indictment charged that Rep. Brehm had accepted cash contributions from two clerks in his congressional office. Convicted on April 30, 1951, on the charge involving one employee, Rep. Brehm received a five-to-fifteen-month suspended sentence and a $5,000 fine on June 11. Rep. Brehm's conviction was upheld in April 24, 1952 (*Brehm v. U.S.*, 196 F.2d 769 (D.C. Cir. 1952); *cert*. *den*., 344 U.S. 838 (1952)).

Sen. Daniel B. Brewster, 1963-1969

Sen Brewster was indicted on December 1, 1969, on five counts of soliciting and accepting bribes while in office in violation of 18 U.S.C. § 201. The indictment alleged that Sen. Brewster had received $19,000 to influence postal rate legislation and $5,000 for acts already performed concerning such legislation. On October 9, 1970, the Federal District Court for the District of Columbia dismissed the indictment on the grounds that Sen. Brewster's actions were protected by the Speech and Debate Clause. The Supreme Court reversed and remanded this decision (*U.S. v. Brewster*, 408 U.S. 501 (1972)).

On November 17, 1972, Mr. Brewster was convicted on three counts of accepting illegal gratuities and was sentenced to two to six years' imprisonment and fined $30,000 on February 2, 1973. Subsequently, the Court of Appeals reversed the conviction for improper jury instructions (*U.S. v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974)). On June 25, 1975, Mr. Brewster pleaded no contest and was fined $10,000.

Rep. J. Herbert Burke, 1967-1978

On May 26, 1978, Rep. Burke was arrested for intoxication, resisting arrest, and trying to influence a witness as a result of a scuffle in a Fort Lauderdale, Florida, bar. Rep. Burke pleaded guilty to the first two charges and no contest to the third and received a sentence of three months' probation on September 26, 1978. (38 *Cong. Quart. Weekly Rept.* 342 (Feb. 9, 1980)).

Sen. Joseph R. Burton, 1901-1906

Sen. Burton was indicted on nine counts of violating R.S. § 1782, prohibiting a government official from receiving compensation for participating in a proceeding in which the United States is a party. The indictment arose from Sen. Burton's allegedly accepting payment for representing a company before the Post Office Department in a mail fraud case between November 22, 1902, and March 26, 1903. Sen. Burton's conviction in the Federal District Court for the Eastern District of Missouri was reversed on the grounds that the offenses charged had not been committed in Missouri where the trial was held (Burton v. U.S., 196 U.S. 283 (1905)).

Reindicted on eight counts of violating R.S. § 1782, Sen. Burton was convicted, sentenced to two to six months' imprisonment, and fined $2,500. The Supreme Court upheld the conviction (Burton v. U.S., 202 U.S. 344 (1906)).

Rep. Charles J. Carney, 1970-1978

On November 12, 1980, former Rep. Carney was indicted on one count of accepting an illegal gratuity. During his service in Congress, Mr. Carney had allegedly received free use of gasoline credit cards from the Lyden Oil Company. Finding the evidence insufficient to hold the indictment, the Federal District Court for the District of Columbia dismissed the case on November 23, 1981. (Washington Post, Nov. 13, 1980, p. 815; 39 Cong. Quart. Weekly Rept. 2369, (Nov. 28, 1981).)

Rep. Frank M. Clark, 1955-1974

As a result of a two-year investigation by the FBI and the Internal Revenue Service, former Rep. Clark was indicted on September 5, 1978, on thirteen counts of mail fraud, perjury, and income tax evasion. The indictment charged that from 1971 to 1975 Mr. Clark had placed employees on his congressional staff to do private and campaign work for him, mailed payroll checks, gave false testimony to a Federal grand jury, and evaded income taxes from 1972 to 1974. After pleading guilty to the mail fraud and income tax evasion charges, Mr. Clark had the other charges dropped, received a sentence of two years in prison, and was fined $11,000. (Washington Post, Sept. 6, 1978, p. A6; 38 Cong. Quart. Weekly Rept. 342 (Feb. 9, 1980).)

Rep. William C. Cramer, 1955-1971

On June 28, 1969, Rep. Cramer was charged with the misdemeanor of leaving the scene of an accident without furnishing the required information after he ran a red light and struck another car. The charge was dropped in Arlington (Va.) County Court on August 27, 1969. (Washington Star, Aug. 28, 1969, p. B4.)

Rep. James M. Curley, 1911-1914, 1943-1947

On September 16, 1943, Rep. Curley was indicted for violating the mail fraud statute (18 U.S.C. § 338) and conspiracy (18 U.S.C. § 88). The indictment charged that Rep. Curley had fraudulently procured government war work and housing construction contracts for a business with which he was connected. The Federal District Court for the District of Columbia voided the indictment on November 1, 1943, on the grounds that the grand jury had been illegally summoned.

Reindicted on January 3, 1944, Rep. Curley was convicted on January 18, 1946, sentenced to six to eight months' imprisonment, and fined $1,000 (aff'd, Curley v. U.S., 160 F.2d 229 (D.C. Cir. (1947); cert. den., 331 U.S. 837 (1947); reh. den., 331 U.S. 869 (1947)). On November 26, 1947, President Harry Truman commuted the remainder of Mr. Curley's sentence.

Rep. Edward E. Denison, 1915-1931

Rep. Denison was charged with illegal possession of an intoxicating beverage in his office on November 19, 1929. The Superior Court for the District of Columbia sustained a demurrer to the indictment on June 30, 1930. (New York Times, July 1, 1930, p. 31.)

Sen. Charles H. Dietrich, 1901-1905

On December 17, 1903, Sen. Dietrich was indicted on five counts for violating R.S. § 1781 (accepting bribes for a government appointment), R.S. § 3739 (holding a government contract while a Senator), and R.S. § 5440 (conspiracy to defraud the government). The indictment alleged that Sen. Dietrich had procured a postmaster's position for a certain individual in 1901 and had held a contract with the Post Office for the use of a building which he owned. At trial a directed verdict of not guilty was entered on three counts because Sen. Dietrich was not a Member of Congress when the acts were committed and nolle prosequi was entered on two counts (U.S. v. Dietrich, 126 F. 676 (D. Neb. 1904)).

Rep. Charles C. Diggs, Jr. 1955-1981

Rep. Diggs was indicted on March 23, 1978, on thirty-five counts of mail fraud (18 U.S.C. § 1341) and of making false statements to the government (18 U.S.C. § 1001). The grand jury accused Rep. Diggs of illegally diverting more than $60,000 of his staff's salaries to his personal use. On October 7, 1978, Rep. Diggs was convicted on twenty-nine counts and, on November 20, sentenced to three years' imprisonment pending an appeal which affirmed his conviction (U.S. v. Diggs, 613 F.2d 988 (D.C. Cir. 1979); cert. den., 446 U.S. 982 (1980)).

Rep. John Dowdy, 1952-1973

On March 31, 1970, Rep. Dowdy was indicted on eight counts of violating 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. § 203 (conflict of interest) and 18 U.S.C. § 1505 (obstruction of justice)), 18 U.S.C. § 1952 (interstate travel to facilitate bribery), and 18 U.S.C. § 1621 (perjury). The indictment arose from Rep. Dowdy's allegedly taking payments from a Maryland home improvement firm accused of defrauding its customers in return for intervening in an investigation of the firm by the Department of Justice. Evidence supporting the indictment was gathered during January, 1970, from court-ordered wiretapping by the FBI.

The Federal Court of Appeals for the Fourth Circuit dismissed Rep. Dowdy's appeal from the indictment on the grounds of immunity on September 1, 1970 (*cert. den.*, 401 U.S. 972 (1971)). On December 31, Rep. Dowdy was convicted on all counts and on January 23, 1972, sentenced to eighteen months' imprisonment and a fine of $25,000. On appeal, Rep. Dowdy's conviction was reversed on the conspiracy, bribery, and two perjury counts but affirmed on three counts of perjury (*U.S. v. Dowdy*, 479 F.2d 213 (4th Cir. 1973); *cert. den.* 414 U.S. 823, 866 (1973); 414 U.S. 1117 (1973)). In its opinion the Court of Appeals held that the wiretapping did not violate Rep. Dowdy's Fourth Amendment rights and did not constitute entrapment (479 F.2d 213, 228-30).

Rep. Joshua Eilberg, 1967-1979

On October 24, 1978, Rep. Eilberg was indicted for illegally accepting compensation for allegedly helping a Philadelphia hospital receive a $14.5 million Federal grant. Rep. Eilberg pleaded guilty on February 24, 1979, and was sentenced to five years' probation and fined $10,000. (38 *Cong. Quart. Weekly Rept*. 342 (Feb. 9, 1980).)

Rep. Daniel J. Flood, 1945-1947, 1949-1953, 1955-1980

On September 9, 1978, Rep. Flood was indicted on three counts of perjury charging that he had lied to the grand jury about payoffs made to him and a former aid. On October 12, Rep. Flood was indicted on ten additional counts of bribery and conspiracy in connection with his allegedly receiving $60,000 in bribes between 1971 and 1976 for using his influence as Chairman of the Labor-HEW Appropriations Subcommittee to benefit private parties and foreign governments. After trial in Federal District Court for the District of Columbia for conspiracy (18 U.S.C. § 371), bribery (18 U.S.C. §§ 2(b), 201(c)), and false declaration (18 U.S.C. § 1623), the jury failed to reach a unanimous verdict, resulting in the declaration of a mistrial on February 3, 1979. On February 26, 1980, Rep. Flood pleaded guilty to defrauding the government and received a sentence of one year's probation. (38 *Cong. Quart. Weekly Rept*. 342 (Feb. 9, 1980); 36 *Cong. Quart. Almanac* 518 (1980).)

Rep. George Foulkes, 1933-1935

During 1934-1935 Rep. Foulkes was indicted and convicted of conspiracy to assess political contributions from postmasters. On conviction Rep. Foulkes received a sentence of eighteen months and a fine of $1,000. (Washington Post, Nov. 9, 1948, p. 9).

Rep. James G. Fulton, 1945-1971

On March 30, 1970, Rep. Fulton was arrested for failure to control his vehicle, causing an accident, and drinking while under the influence of alcohol near Miami, Florida. Research has uncovered no further details of the outcome of this incident. (New York Times, Mar. 31, 1970, p. 18.)

Rep. Cornelius Gallagher, 1959-1973

On April 7, 1972, Rep. Gallagher was indicted for Federal income tax evasion, perjury, and conspiracy. The indictment charged that Rep. Gallagher had evaded over $100,000 in income tax payments, committed perjury as to ownership of certain bonds, and conspired to conceal kickbacks for assisting co-conspirators in tax evasion. Rep. Gallagher pleaded guilty to the income tax evasion charge on December 21, 1972, and received a two-year prison sentence and a $10,000 fine on June 15, 1973. (38 Cong. Quart. Weekly Rept. 341 (Feb. 9, 1980); Washington Post, Apr. 22, 1972, p. A2.)

Rep. Edward A. Garmatz, 1947-1973

After a two-year investigation of corruption in the shipping industry by Federal prosecutors in New Jersey, former Rep. Garmatz was indicted on August 1, 1977, for bribery and conspiracy. The indictment alleged that Mr. Garmatz had accepted up to $15,000 in 1972 from shipping companies for facilitating legislation beneficial to them while he chaired the Committee on Merchant Marine and Fisheries. The Department of Justice dropped the case when it learned that a key witness had committed perjury and forgery. (38 Cong. Quart. Weekly Rept. 342 (Feb. 9, 1980); 35 Cong. Quart. Weekly Rept., 1666 (Aug. 6, 1977).)

Rep. William J. Green, Jr., 1945-1947, 1948-1963

On December 14, 1956, Rep. Green was indicted for conspiracy to defraud the government by allegedly accepting money and business from contracts in return for influencing decisions on construction of an Army Signal Corps depot in Tobyhanna, Pennsylvania. He was acquitted on February 27, 1959. (38 Cong. Quart. Weekly Rept. 340-341 (Feb. 9, 1980).)

Sen. Edward J. Gurney, 1969-1975

A Florida grand jury indicted Sen. Gurney on April 6, 1974, for a misdemeanor violation of the State campaign finance law. A Leon County court dismissed the indictment on May 17 for vagueness.

On August 10, 1974, Sen. Gurney was indicted by a Federal grand jury for conspiracy, perjury, and soliciting bribes. Sen. Gurney had allegedly sought campaign contributions from Florida builders with business pending before the Department of Housing and Urban Development. In a trial before a Federal district court in Florida, Sen. Gurney was acquitted of soliciting bribes and the jury failed to reach a verdict on conspiracy and perjury charges on August 6, 1975. Sen. Gurney was acquitted of a final charge of perjury on October 27, 1976. (38 Cong. Quart. Weekly Rept. 340 (Feb. 9, 1980).)

Rep. Richard T. Hanna, 1963-1974

On October 14, 1977, former Rep. Hanna was indicted for conspiracy to defraud the government based on his alleged dealings with a South Korean businessman. Mr. Hanna pleaded guilty to the charge on March 17, 1978. (38 Cong. Quart. Weekly Rept. 342 (Feb. 9, 1980).)

Rep. George V. Hansen, 1965-1969, 1975

On February 19, 1975, Rep. Hansen pleaded guilty to two misdemeanor counts of violating the Federal Election Campaign Act of 1971 by failing to file a campaign finance report and filing an erroneous report in 1974. In April Rep. Hansen was given a ten-month suspended sentence, a year's probation, and a fine of $2,000. (38 Cong. Quart. Weekly Rept. 341 (Feb. 9, 1980).)

Rep. James F. Hastings, 1969-19

Rep. Hastings was indicted on September 21, 1976, on twenty-six counts of mail fraud and nine counts of filing false vouchers. The indictment alleged that Rep. Hastings had received kickbacks from the salaries of three staffers from 1969 to 1975. On December 17, Rep. Hastings was convicted on twenty-eight counts of the indictment. (38 Cong. Quart. Weekly Rept. 342 (Feb. 9, 1980); New York Times, Sept. 22, 1976, p. 35; Washington Star, Sept. 22, 1976, p. A5.)

Rep. Henry J. Helstoski, 1965-1977

On June 2, 1976, Rep. Helstoski was indicted on twelve counts of bribery (18 U.S.C. § 201) and conspiracy (18 U.S.C. § 371). The indictment charged Rep. Helstoski with soliciting and obtaining bribes from resident aliens in return for facilitating legislation on their behalf. On February 23, 1977, the Federal District Court for New Jersey denied Rep. Helstoski's motion to dismiss the indictment, but stated that the Speech and Debate Clause precluded the government's using past legislative acts as evidence (aff'd, U.S. v. Helstoski, 576 F.2d 511 (3rd Cir. 1978); aff'd, 442 U.S. 477 (1979); see also Helstoski v. Meaner, 442 U.S. 500 (1979)). Consequently, seven counts of the twelve-count indictment were dismissed on September 22, 1979; the final five were dismissed on February 27, 1980 (aff'd, U.S. v. Helstoski, 635 F.2d 200 (3rd Cir. 1980)).

Rep. Philemon T. Herbert, 1855-1857

Rep. Herbert was indicted for manslaughter in May, 1856, following the shooting death of a hotel waiter in the District of Columbia. He was acquitted in July of the same year. (Hinds' Precedents of the House of Representatives, § 1277; 1857 Cong. Globe 843.)

Rep. Binger Hermann, 1885-1897, 1903-1907

Rep. Hermann was indicted on December 31, 1904, for conspiracy to defraud the United States of public lands and again on March 4, 1905, for destroying public records on leaving office as Commissioner in the Land Office. The indictments were subsequently dismissed. (New York Times, Jan. 1, 1905, p. 1)

Rep. Andrew J. Hinshaw, 1973-1977

Rep. Hinshaw received two indictments from a California State grand jury on May 6, 1975. The first charged Rep. Hinshaw with soliciting a bribe, accepting bribes, embezzlement, and misappropriation of public funds. Allegedly Rep. Hinshaw had accepted money and equipment from a stereo company to influence his official conduct and had embezzled funds as assessor of Orange County. the second indictment accused Rep. Hinshaw of conspiracy, grand theft, and embezzlement in connection with his allegedly using staff of the assessor's office to work on his campaign for election to the House of Representatives.

On October 10, 1975, the Superior Court of California, Orange County, dismissed the charges of embezzlement and misappropriation of public funds from the first indictment. Rep. Hinshaw was then convicted of bribery but acquitted of soliciting a bribe on January 26, 1976. On February 14, he was sentenced to one to fourteen years in prison; the conviction was upheld by the California Court of Appeals, Fourth Appellate District, and the U.S. Supreme Court (Hinshaw v. Superior Ct. of Cal., Cty. of Orange, 429 U.S. 1039 (1977). On December 3, 1976, Rep. Hinshaw was convicted of misappropriation of public funds and petty theft as the result of the second indictment. (38 Cong. Quart. Weekly Rept. 341 (Feb. 9, 1980); H. Rept. 94-1477.)

Rep. Jon C. Hinson, 1979-1981

On February 4, 1981, Rep. Hinson was arrested for allegedly committing sodomy in a House of Representatives office building men's room that was under surveillance by the Capitol Police because of numerous complaints. Rep. Hinson pleaded no contest on May 28 in Superior Court for the District of Columbia to a reduced charge of attempted oral sodomy and was given a suspended sentence of thiry days in jail and one year's probation. (36 Cong. Quart. Almanac 518 (1980); 37 Cong. Quart. Almanac 385 (1981).)

Rep. John H. Hoeppel, 1933-1936

Rep. Hoeppel was indicted for conspiracy to violate 18 U.S.C. § 150 (soliciting or accepting payment for using influence in obtaining a government appointment). The indictment charged that in 1934 Rep. Hoeppel had conspired to solicit payment for a nomination to the United States Military Academy. Rep. Hoeppel was convicted in the Supreme Court of the District of Columbia (aff'd, Hoeppel v. U.S., 85 F.2d 372 (D.C. Cir. 1936); cert. den., 299 U.S. 577 (1936)).

Rep. Frank Horton, 1963-

On July 18, 1976, Rep. Horton was arrested for reckless driving, driving while intoxicated, and speeding near Rochester, New York. Rep. Horton pleaded guilty, received a sentence of eleven days in jail and a $200 fine, and had his driver's license revoked on August 31, 1976. (34 Cong. Quart. Weekly Rept. 2031, 2495 (July 21, Sept. 11, 1976).)

Rep. Allan T. Howe, 1975-1977

For allegedly approaching two Salt Lake City policewomen posing as prostitutes, Rep. Howe was arrested on June 12, 1976, for solicitation of sex for pay. On July 23, Rep. Howe was convicted in Salt Lake City Court and sentenced to thirty days in jail and a fine of $150. Sentence was suspended pending an appeal to the District Court which, on August 24, resulted in conviction, a suspended sentence of thirty days, and assessment of court costs. (38 Cong. Quart. Weekly Rept. 342 (Feb. 9, 1980); New York Times, Aug. 26, 1976, p. 26.)

Rep. Theodore L. Irving, 1949-1953

On June 8, 1951, Rep. Irving was indicted for violation of the Corrupt Practices Act and the Taft-Hartley Act for alleged misuse of funds of the labor union he headed in his campaign in 1948 for election to the House of Representatives. He was acquitted on December 28. (38 Cong. Quart. Weekly Rept. 340 (Feb. 9, 1980.)

Rep. John W. Jenrette, Jr. 1975-1980

Rep. Jenrette was involved in the Department of Justice ABSCAM investigation of various Members of Congress conducted in 1979-1980 that made use of informants, undercover agents, wiretapping, and audio/visual tapes. On June 13, 1980, Rep. Jenrette was indicted on two counts of bribery (18 U.S.C. § 201) and one count of conspiracy (18 U.S.C. § 371). The indictment charged Rep. Jenrette with accepting bribes in return for promising assistance in introducing immigration legislation to benefit "Arab businessmen." Rep. Jenrette was convicted on all counts on October 7, 1980, in the Federal District Court for the District of Columbia. (H. Rept. 96-1537, v. 1.)

Rep. Thomas F. Johnson, 1959-1963

On October 16, 1962, Rep. Johnson was indicted on eight counts of conspiracy (18 U.S.C. § 371) and conflict of interest (18 U.S.C. § 281). The indictment alleged that Rep. Johnson had received more than $20,000 for giving a speech in the House of Representatives favorable to savings and loan institutions and dealing with the U.S. Attorney General and an Assistant Attorney General in an attempt to obtain dismissal of an indictment against a Maryland savings and loan association for mail fraud. (See Rep. Frank W. Boykin, above.)

On February 28, 1963, the Federal District Court for Maryland held that prosecution of Rep. Johnson was not barred by congressional privilege or by the Speech and Debate Clause (U.S. v. Johnson et. al., 215 F. Supp. 300 (D. Md. 1963)). Although Rep. Johnson was convicted on June 13, 1963, the Court of Appeals reversed and ordered a new trial on the grounds that prosecution was indeed barred by the Speech and Debate Clause (U.S. v. Johnson et al., 337 F.2d 180 (4th Cir. 1964); aff'd, 383 U.S. 169 (1966)). On retrial in January, 1968, Mr. Johnson was convicted of conflict of interest and sentenced to six months in prison.

Rep. James R. Jones, 1973-

Rep. Jones pleaded guilty to a misdemeanor campaign violation on January 29, 1976, in Federal District Court for the District of Columbia for his alleged failure to report corporate campaign contributions in 1972. On March 16 he was fined $200. The charge against Rep. Jones grew out of an investigation by the Watergate Special Prosecutor's Office. (38 Cong. Quart. Weekly Rept. 341-342 (Feb. 9, 1980); New York Times, Jan. 30, 1976, p. 11.)

Rep. Richard Kelly, 1975-1980

Rep. Kelly was involved in ABSCAM (see Rep. John W. Jenertte, Jr., above). On July 15, 1980, Rep. Kelly was indicted for bribery (18 U.S.C. § 201), conspiracy (18 U.S.C. § 371), and violation of the Travel Act (18 U.S.C. § 1952). Rep. Kelly had allegedly received $25,000 to facilitate immigration legislation. Convicted before the Federal District Court for the District of Columbia on January 26, 1981, Mr. Kelly had his motion for dismissal of the indictment and acquittal granted on the grounds that the government violated due process in its investigation (U.S. v. Kelly et al., Cr. No. 80-00340 (D.C.D.C. May 13, 1982)).

Rep. Thomas J. Lane, 1941-1963

On March 5, 1956, Rep. Lane was indicted for Federal income tax evasion. He pleaded guilty on March 30 and received a sentence of four months' imprisonment and a fine of $10,000. (38 Cong. Quart. Weekly Rept. 340 (Feb. 9, 1980)).

Rep. John W. Langley, 1907-1926

Rep. Langley was indicted in Kentucky for conspiracy to violate the National Prohibition Act by allegedly receiving loans for using his influence to obtain permits for a whiskey selling scheme. On May 13, 1924, Rep. Langley was convicted in the Federal District Court for the Eastern District of Kentucky and sentenced to two years' imprisonment (aff'd, Langley v. U.S., 8 F.2d 815 (6th Cir. 1925); cert. den., 269 U.S. 588 (1926)). Evidence also exists to the effect that Rep. Langley was indicted in the District of Columbia for an unspecified offense around this time. (Cannon's Precedents of the House of Representatives, § 238.)

Rep. A. Claude Leach, Jr., 1979-1980

On July 20, 1979, Rep. Leach was indicted for conspiracy (18 U.S.C. § 371), buying votes (42 U.S.C. § 1973i), and accepting illegal compaign contributions (2 U.S.C. § 441a) all in connection with his campaign for election to the House of Representatives in 1978. On November 3, 1979, Rep. Leach was acquitted of buying votes in the general election; on January 4, 1980, a Federal judge in Louisiana dropped the charge of vote-buying in the primary at the request of the prosecution. No details on the outcome of the campaign violation case were found. (38 Cong. Quart. Weekly Rept. 342 (Feb. 9, 1980).)

Rep. Raymond F. Lederer, 1977-1981

Rep. Lederer was involved in ABSCAM (see Rep. John W. Jenrette, Jr., above). On May 28, 1980, Rep. Lederer was indicted for bribery, conspiracy, accepting an illegal gratuity, and interstate travel to aid racketeering. The indictment alleged that Rep. Lederer had accepted $50,000 to facilitate immigration legislation for "Arab businessmen." Rep. Lederer was convicted on January 9, 1981, in Federal District Court for the Eastern District of New York and sentenced to three years in prison and a fine of $20,000 on August 13.

A motion to dismiss the indictment on the grounds of prejudicial pre-indictment publicity had been denied on August 5, 1980 (U.S. v. Lederer et al., 510 F. Supp. 319 (E.D.N.Y. 1980)). Another motion to overturn the conviction and dismiss the indictment on the grounds of entrapment inter alia was denied on June 24, 1981 (Lederer et al. v. U.S., 527 F. Supp. 1206 (E.D.N.Y. 1981)). Mr. Lederer has appealed from this decision.

Rep. Matthew Lyon, 1797-1801

Rep. Lyon was prosecuted for and convicted of violation of the Sedition Act in 1798. His fine was refunded to his heirs in 1840. (Dictionary of American Biography, vol. 6, p. 533.)

Rep. Martin B. McKneally, 1969-1971

Rep. McKneally was indicted on December 16, 1970, for allegedly failing to file Federal income tax returns from 1964 to 1967. When, on October 18, 1970, Rep. McKneally pleaded guilty to failure to file in 1965, the other charges were dropped. On December 20, Rep. McKneally was given a one-year suspended sentence, placed on one year's probation, and fined $5,000. (38 *Cong. Quart. Weekly Rept.* 341 (Feb. 9, 1980).)

Rep. John L. McMillan, 1939-1973

On January 14, 1953, Rep. McMillan was indicted for violating a law prohibiting a Member of Congress from contracting with the government. The indictment alleged that Rep. McMillan had illegally leased oil and gas lands in Utah from the Department of the Interior. Rep. McMillan was acquitted on May 15, 1953. (38 *Cong. Quart. Weekly Rept.* 340 (Feb. 9, 1980).)

Rep. Andrew J. May, 1931-1947

Rep. May was indicted on January 23, 1947, on four counts of conspiracy (18 U.S.C. § 371) to defraud the government by violating 18 U.S.C. § 281 which prohibits Members of Congress from receiving compensation in matters affecting the government. Rep. May had allegedly received $60,000 for using his influence with the War Department from 1942 to 1946 to promote the interests of a company involved in the production of war materials. On July 3, 1947, Rep. May was acquitted of one count and convicted on the other three (*aff'd*, *May v. U.S.*, 175 F.2d 994 (D.C. Cir. 1946); *cert. den.*, 338 U.S. 830 (1949)).

Rep. M. Alfred Michaelson, 1921-1931

On October 17, 1928, Rep. Michaelson was indicted for violation of the Prohibition Amendment for allegedly importing liquor from Cuba to Florida in January, 1928. He was acquitted on May 9, 1929. (*New York Times*, Mar. 29, 1929, p. 1, May 9, 1929, p. 1.)

Sen. John H. Mitchell, 1885-1897, 1901-1905

Sen. Mitchell was indicted in 1904 for conspiracy and bribery. Allegedly, Sen. Mitchell had issued false statements and documents of ownership of public lands in Oregon in January, 1902, and had received $2,000 in March of that year to influence issuance of land patents based on false applications. Sen. Mitchell died on December 8, 1905, before final disposition of the case. (Hinds' *Precedents of the House of Representatives*, § 1278; William R. Tansill, "Members of Congress Who Were Indicted for Criminal Offenses...," Oct. 12, 1962, p. 1.)

Rep. John M. Murphy, 1963-1980

Rep. Murphy was involved in ABSCAM (see Rep. John W. Jenrette, Jr., above). On June 18, 1980, Rep. Murphy was indicted for conspiracy to demand and accept money to influence the performance of his official duties, bribery, acceptance of outside compensation for the performance of his official duties, aiding and abetting interstate travel to aid racketeering, and receiving an unlawful gratuity. The indictment charged that, in consequence of agreements made by him with "Arab businessmen," Rep. Murphy had shared in the receipt of $50,000 to facilitate immigration legislation and had promised to use his position as chairman of the Committee on Merchant Marine and Fisheries to find investment opportunities for "Arab" shipping companies.

A motion to dismiss the indictment on the grounds of prejudicial pre-indictment publicity was denied on August 5, 1980 (U.S. v. Thompson et al., 510 F. Supp. 319 (E.D.N.Y. 1980)). A second motion to dismiss on the basis of the Speech and Debate Clause was also denied (aff'd, U.S. v. Murphy et al., 642 F.2d 699, (2d Cir. 1980)). On December 3, 1980, Rep. Murphy was convicted on all counts except the charges of bribery and aiding and abetting. He was sentenced to three years in prison and a $20,000 fine on August 13, 1981, after a motion to overturn the conviction on the grounds of entrapment inter alia was denied (U.S. v. Thompson et al., 527 F. Supp. 1206 (E.D.N.Y. 1981)). An appeal is pending.

Rep. Michael O. Myers, 1976-1980

Rep. Myers was involved in two criminal proceedings. First, on January 16, 1979, Rep. Myers was charged with assault and battery of a cashier at a hotel bar in Arlington, Virginia. He pleaded no contest on April 10 and was given a six-month suspended sentence. (Washington Post, Jan. 18, 1979, p. A3; Washington Star, Apr. 10, 1979, pp. A1, A8.)

In addition, Rep. Myers was involved in ABSCAM (see Rep. John W. Jenrette, Jr., above). On May 27, 1980, Rep. Myers was indicted for bribery (18 U.S.C. § 201), conspiracy (18 U.S.C. § 371), and violation of the Travel Act (18 U.S.C. § 1952). The indictment alleged that Rep. Myers had accepted $50,000 to introduce private immigration bills and intervene with the State Department to permit "Arab businessmen" to remain in the United States.

A motion to dismiss the indictment on the grounds of prejudicial pre-indictment publicity was denied on August 5, 1980 (U.S. v. Myers et al., 510 F. Supp. 319 (E.D.N.Y. 1980); aff'd, 635 F.2d 932 (2d Cir. 1980); cert. den. 449 U.S. 956 (1980)). Rep. Myers was convicted on August 30, 1980. A further motion to dismiss the indictment and reverse the conviction on the grounds of entrapment inter alia was denied (U.S. v. Myers et al., 527 F. Supp. 1206 (E.D.N.Y. 1981)). On August 13, 1981, Rep. Myers was sentenced to three years in prison and fined $20,000. He has appealed.

Sen. Truman H. Newberry, 1919-1922

In 1919 Sen. Newberry was indicted for conspiracy to violate section 8 of the Federal Corrupt Practices Act. The indictment alleged that Sen. Newberry had conspired to spend more than $3,750 to secure election to the Senate between December, 1917, and November, 1918. Sen. Newberry was convicted, but the Supreme Count reversed on the grounds that the lower court erroneously overruled a demurrer challenging the constitutionality of section 8 (Newberry v. U.S., 256 U.S. 232 (1921)).

Rep. Otto E. Passman, 1947-1977

On March 31, 1978, former Rep. Passman was indicted for bribery, conspiracy and Federal income tax evasion for allegedly accepting over $200,000 in illegal payments from a South Korean businessman. Mr. Passman was acquitted on April 1, 1979. (38 Cong. Quart. Weekly Rept. 342 (Feb. 9, 1980).)

Rep. Bertram L. Podell, 1968-1975

On July 12, 1973, Rep. Podell was indicted for conspiracy, bribery, perjury, and conflict of interest. The indictment charged that Rep. Podell had made false statements to the FBI, had lied to the grand jury, and had received $41,000 in legal fees and campaign contributions for influencing a Federal agency in a granting an airline route. On October 1, 1974, Rep. Podell pleaded guilty to conspiracy and conflict of interest; he was sentenced to six months' imprisonment and fined $5,000. Denial by the Federal District Court for the Southern District of New York to withdraw the "guilty" pleas was upheld on June 24, 1975 (U.S. v. Podell et al., 519 F.2d 144 (2d Cir. 1975); cert. den., 423 U.S. 926 (1975)).

Rep. Adam C. Powell, Jr. 1945-1967, 1969-1971

Rep. Powell was twice the subject of criminal actions. On May 8, 1958, Rep. Powell was indicted for Federal income tax evasion. Two of three counts were subsequently dismissed and a mistrial on the third count was declared on April 22, 1960, because of a hung jury. The case was dismissed at the request of the U.S. attorney on April 13, 1961.

Rep. Powell was twice held in criminal contempt for failure to appear in court in a civil suit (James v. Powell, 52 Misc.2d 1048, 1054, 277 N.Y.S.2d 955, 962 (Sup. Ct. 1966)). Conviction for criminal contempt was modified to one for civil contempt (aff'd, James v. Powell, 32 A.D.2d 517, 298 N.Y.S.2d 840 (App. Div. 1969)).

Rep. Frederick W. Richmond, 1975-

On April 6, 1978, Rep. Richmond was charged in Superior Court of the District of Columbia with a misdemeanor for solicitation for prositution. Rep. Richmond had allegedly offered an undercover police officer up to $100 for sexual favors in February. The undercover officer, carrying tape recording equipment, had met with Rep. Richmond after a youth had complained about earlier solicitations. When he was charged Rep. Richmond pleaded innocent; charges were dropped on May 3 after Rep. Richmond had completed the District of Columbia first offender program. (38 *Cong. Quart. Weekly Rept.* 342 (Feb. 9, 1980); *Washington Post*, Apr. 6, 1978, pp. A1, A10, Apr. 7, 1978, p. A4.)

Rep. Angelo D. Roncallo, 1973-1975

On February 21, 1974, Rep. Roncallo was indicted for extortion of political contributions. The indictment charged that, when he was comptroller of Nassau County, New York, in 1970, Rep. Roncallo had allegedly extorted contributions from an incinerator contractor. Rep. Roncallo was acquitted in the Federal District Court for the Eastern District of New York on May 17, 1974. (38 *Cong. Quart. Weekly Rept.* 341 (Feb. 9, 1980).)

Rep. Harry E. Rowbottom, 1925-1931

According to the scant information available, Rep. Rowbottom was indicted and convicted for accepting bribes from Post Office applicants in 1931. *Washington Post*, Nov. 9, 1948, p. 9.)

Rep. Robert Smalls, 1875-1879

Rep. Smalls was arrested in October, 1877, and subsequently indicted in South Carolina for allegedly accepting a bribe on December 12, 1872, when he was a State senator. On November 8, 1877, Rep. Smalls' motion to have the case removed to Federal District Court was denied; his motion for release on the grounds that his arrest violated his privilege as a Member of Congress was also denied. Rep. Smalls was convicted and sentenced to five years' imprisonment. (Hinds' *Precedents of the House of Representatives*, § 2673.)

Sen. John Smith, 1804-1817

Sen. Smith was indicted for treason and misdemeanor in 1807 in the Federal Circuit Court in Virginia. Sen. Smith had been implicated in the conspiracy of Aaron Burr against the United States. Prosecution of Sen. Smith was dropped after the amount of evidence was found insufficient to find Burr guilty. (Sen. Doc. 92-7, p. 4; Hind's *Precedents of the House of Representatives*, § 1264.)

Rep. J. Parnell Thomas, 1937-1950

On November 8, 1948, Rep. Thomas was indicted for conspiracy to defraud the government. The indictment alleged that Rep. Thomas had padded his congressional payroll and had taken kickbacks from his staff. Rep. Thomas pleaded no contest on November 30, 1949, and received a sentence of six-to-eighteen months in prison and a fine of $10,000. (38 Cong. Quart. Weekly Rept. 340 (Feb. 9, 1980).)

Rep. Frank Thompson, Jr., 1955-1980

Rep. Thompson was involved in ABSCAM (see Rep. John W. Jenrette, Jr., above). On June 18, 1980, Rep. Thompson was indicted for conspiracy to demand and accept money to influence the performance of his official duties, bribery, acceptance of outside compensation for performance of his official duties, aiding and abetting interstate travel to aid racketeering, and aiding and abetting receipt of an unlawful gratuity. The indictment alleged that Rep. Thompson had agreed to share in the receipt of payments to facilitate private immigration legislation and to introduce "Arab businessmen" to other Members of Congress and that he had sought investments for these "businessmen."

A motion to dismiss the indictment on the grounds of prejudicial pre-indictment publicity was denied on August 5, 1980 (U.S. v. Thompson et al., 510 F. Supp. 319 (E.D.N.Y. 1980). A second motion to dismiss on the basis of the Speech and Debate Clause was also denied (aff'd, U.S. v. Murphy et al., 642 F.2d 699, (2d Cir. 1980)). On December 3, 1980, Rep. Thompson was convicted; but he was found innocent of accepting outside compensation and the charge of aiding and abetting travel for racketeering was dropped. He was sentenced to three years in prison and a $20,000 fine on August 13, 1981, after a motion to overturn the conviction on the ground of entrapment inter alia was denied (U.S. v. Thompson et al., 527 F. Supp. 1206 (E.D.N.Y. 1981). An appeal is pending.

Rep. Richard A. Tonry, 1977

On May 12, 1977, Rep. Tonry was indicted for violating Federal election law, obstructing justice, conspiring to obstruct justice, receiving illegal campaign contributions, and promising Federal patronage to contributors. Rep. Tonry had allegedly received campaign funds in excess of the legal amount, offered rewards of Federal employment, and encouraged others to lie to the grand jury. On July 1, 1977, Rep. Tonry pleaded guilty to four misdemeanors of conspiracy, receiving illegal campaign contributions, and promising favors in return for contributions; consequently, eleven felony charges were dropped. Rep. Tonry was sentenced to one year's imprisonment and fined $10,000. (New York Times, May 13, 1977, p. A10, July 2, 1977, p. 5; Washington Post, July 29, 1977, p. A8.)

Rep. J. Irving Whalley, 1960-1973

On July 5, 1973, Rep. Whalley was indicted for mail fraud and obstruction of justice. The indictment charged that Rep. Whalley had used the mail to deposit salary kickbacks from his congressional staff and had threatened an employee to prevent her giving information against him to the FBI. Rep. Whalley pleaded guilty in Federal District Court for the District of Columbia on July 31 and received a three-year suspended sentence and a fine of $11,000 on October 15. (38 Cong. Quart. Weekly Rept. 341 (Feb. 9, 1980).)

Sen. Burton K. Wheeler, 1923-1947

In April, 1924, Sen. Wheeler was indicted in Montana's Federal District Court for violation of R.S. § 1782 (prohibiting Members of Congress from receiving compensation for services in cases in which the United States is a party). Sen. Wheeler had allegedly accepted money for appearing on behalf of a client before the Department of the Interior to obtain oil leases. The indictment was subsequently dismissed. (Sen. Doc. 92-7, p. 114.)

Rep. B. Frank Whelchel, 1935-1945

In 1940 Rep. Whelchel was indicted for and acquitted of allegedly accepting money to obtain appointive offices for certain constituents. No further information on Rep. Whelchel's case is ready available (Washington Post, Nov. 9, 1948, p. 9.)

Sen Harrison A. Williams, Jr. 1959-1982

Sen Williams was involved in ABSCAM (see Rep. John W. Jenrette, Jr. above). On October 30, 1980, Sen. Williams was indicted on nine counts of conspiracy to defraud the United States, bribery, receiving an unlawful gratuity, receiving illegal compensation, interstate travel to commit bribery, and interstate travel to aid racketeering. The indictment alleged that Sen. Williams had agreed to a business scheme involving receipt of a loan and stock certificates from "Arab businessmen" for a titanium mine and processing facility in return for using his influence to help the enterprise obtain favorable government contracts. Sen. Williams had also allegedly promised to introduce immigration legislation for the "businessmen."

On March 27, 1981, the Second Circuit Court of Appeals upheld on order of the Federal District Court for the Eastern District of New York denying dismissal of the indictment or release of the grand jury on the basis of violation of the Speech and Debate Clause inter alia (U.S. v. Williams, 644 F.2d 950 (2d Cir. 1981)). Subsequently, on May 1, 1981, Sen. Williams was convicted on all counts. On December 22, Sen. Williams' motion to overturn the conviction and dismiss the indictment for violation of due process was denied (U.S. v. Williams et al., 529 F. Supp. 1085 (E.D.N.Y. 1981)). An appeal is pending.

Rep. John N. Williamson, 1903-1907

On February 11, 1905, Rep. Williamson was indicted for violating R.S. § 5440 (conspiracy to defraud the United States). The indictment charged that Rep. Williamson had induced others to commit perjury in proceedings for the purchase of public lands in Oregon under the Timber and Stone Act. Rep. Williamson was convicted and sentenced to ten months' imprisonment in September, 1905. The Court of Appeals for the Ninth Circuit dismissed an appeal on March 11, 1907, on the grounds that Rep. Williamson had elected to appeal directly to the Supreme Court (Williamson v. U.S., 153 F. 46 (9th Cir. 1907)). On appeal the Supreme Court reversed the conviction on the grounds that the indictment did not charge conspiracy to suborn perjury in the final proofs, so that the District Court had made a prejudicial error in instructions to the jury on that point (Williamson v. U.S., 207 U.S. 425 (1908)).

Rep. Wendell Wyatt, 1964-1975

After an investigation by the Watergate Special Prosecutor, Rep. Wyatt was charged with a misdemeanor violation of the Federal Election Compaign Act of 1971. Specifically, Rep. Wyatt was alleged to have failed to report expenditures from a secret fund during President Nixon's reelection campaign in 1972. On June 11, 1975, Rep. Wyatt pleaded guilty and on August 18, was fined $750. (38 Cong. Quart. Weekly Rept. 341 (Feb. 9, 1980).)

Rep. Frederick N. Zihlman, 1917-1931

Evidence exists to the effect that on December 10, 1929, Rep. Zihlman was indicted by a grand jury of the Superior Court of the District of Columbia for an offense of which he was subsequently acquitted. (Cannon's Precedents of the House of Representatives §§ 402, 403, 2205).

APPENDIX G

SUMMARY OF ABSCAM PROSECUTIONS THROUGH SEPTEMBER 1982

The following reports summarize the criminal prosecutions of the seven Members of Congress involved in ABSCAM. The materials, which were prepared by Eugene Pugliese, Assistant Counsel for the House Judiciary Committee, were published by the House Judiciary Committee in its report, *Court Proceedings and Actions of Vital Intent to the Congress*, 98th Congress, 1st Session, (Committee Print 98–1). The Select Committee wishes to thank Judiciary Committee Chairman Peter W. Rodino, Jr. for permitting the reprinting of these valuable reports.

I. Bribery, Fraud, and Related Offenses

1. ABSCAM:

United States v. Jenrette

Criminal Case No. 80-00289 (D.D.C.)

On June 13, 1980, U.S. Representative John W. Jenrette of South Carolina was indicted by a Federal grand jury in the District of Columbia. Indicted with Rep. Jenrette was John R. Stowe, a private citizen living in Richmond, Virginia.

Count I of the three count indictment charged the defendants with conspiracy,[1] contrary to 18 U.S.C. § 371.[2] Specifically, it was alleged that in late 1979 the defendants agreed with "Tony DeVito" that in return for $100,000 Rep. Jenrette would introduce in the U.S. House of Representatives a private immigration bill on behalf of a foreign businessman who desired to immigrate to the United States. Supposedly, DeVito was the foreign businessman's agent. In reality, however, DeVito was Anthony Amoroso, Jr., a Special Agent of the Federal Bureau of Investigation ("FBI").

Count I also alleged that on December 6, 1979 defendant Stowe met with DeVito and Melvin Weinberg (purportedly an employee of the foreign businessman, but in reality a private citizen assisting the FBI). At this meeting DeVito and Mr. Weinberg allegedly transferred $50,000 in cash to Mr. Stowe who accepted it on behalf of Rep. Jenrette and himself. Allegedly, it was agreed that Mr. Weinberg and DeVito would transfer another $50,000 to the defendants after the private immigration bill was introduced. According to the indictment, the total payment of $100,000 was to be shared by Rep. Jenrette and Mr. Stowe.

Count I also claimed that on January 28, 1980 Rep. Jenrette told DeVito that he would cause U.S. Senator Strom Thurmond of South Carolina to introduce in the Senate another private immigration bill on behalf of the foreign businessman. For his efforts, Rep. Jenrette would receive $125,000 after the private immigration bill was introduced. The indictment specifically stated, however, that at no time did Rep. Jenrette or Mr. Stowe, or anyone on their behalf, discuss the subject with Senator Thurmond.

Count II charged that by seeking and receiving a sum of money in return for his promise to introduce a private immigration bill in Congress, Rep. Jenrette commited bribery, contrary to 18 U.S.C.

---

[1] Specifically, conspiracy to violate 18 U.S.C. § 201(c) (bribery).

[2] 18 U.S.C. § 371 provides: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 201(c).[3] Count II also charged Mr. Stowe with aiding and abetting Rep. Jenrette in the commission of bribery. Accordingly, Mr. Stowe was charged with criminal liability as a principal, pursuant to 18 U.S.C. § 2.[4]

Count III charged that by seeking $125,000 from DeVito in return for his promise to influence Senator Thurmond to introduce a private immigation bill in the Senate, Rep. Jenrette committed bribery, again contrary to 18 U.S.C. § 201(c). Once again Mr. Stowe was charged with criminal liability for aiding and abetting, pursuant to 18 U.S.C. § 2.

On June 17, 1980, Rep. Jenrette pled not guilty to all counts.

On July 14, 1980, Rep. Jenrette filed a motion to dismiss pursuant to the Speech or Debate Clause.[5] Alternatively, he asked permission to review the minutes of the grand jury. In his accompanying memorandum, he argued that the allegation in Count I—that he never discussed immigration matters with Senator Thurmond—indicated that the grand jury improperly sought to determine the occurrence and content of conversations between Members of Congress on legislative matters. If the grand jury questioned Senator Thurmond himself, said Rep. Jenrette, or if it questioned others who might have had knowledge of communications between Rep. Jenrette and Senator Thurmond, it may have violated the Speech or Debate Clause. Accordingly, Rep. Jenrette asked the court to allow him to review the entire grand jury proceedings to determine whether impermissible examinations of legislative acts occurred.

On August 5, 1980, the Government filed its response to Rep. Jenrette's motion regarding the Speech or Debate Clause. The Government asserted that the definition of "legislative acts" did not include acts of bribery by Congressmen. The Government further asserted that its evidence at trial would include no acts done by Rep. Jenrette or Senator Thurmond in the regular course of the legislative process.

On August 28, 1980, the court, Judge John Garret Penn presiding, denied Rep. Jenrette's motion to dismiss on Speech or Debate Clause grounds. Likewise, Rep. Jenrette's request to inspect the grand jury minutes was denied. No memorandum accompanied the court's order.

On July 14, 1980, Rep. Jenrette filed a motion to dismiss on the basis of Government overreaching and entrapment. Regarding overreaching, it was Rep. Jenrette's contention that the nature and extent of the FBI involvement in creating and maintaining the ABSCAM operation was so outrageous as to bar prosecution under the due process clause of the Fifth Amendment. In support of this contention, the defendant relied on *United States v. Russell,* 411 U.S. 423 (1973); *Hampton v. United States,* 425 U.S. 484 (1976); *United States v. Twigg,* 588 F.2d 373 (3rd Cir. 1978); and *United States v. Archer,* 486 F.2d 670 (2d Cir. 1973). These cases, said the defendant, indicated, first, that Government misconduct may be so egregious in a given case that prosecution will be barred regardless of whether the defendant was predisposed to commit the charged crime. Next, the defendant likened the facts of the instant case to the facts in *Twigg, supra,* a case in which the Third Circuit dismissed an indictment because of the Government's overinvolvement in the commission of the crime. In both *Twigg* and the instant case, said Rep. Jenrette, Government agents devised the illegal scheme and then initiated contact with the defendant. In fact, said Rep. Jenrette, the conduct of the Government agents in the present case was even more outrageous than in *Twigg,* since in *Twigg* evidence existed that the defendant was predisposed to commit the crime. By contrast, said Rep. Jenrette, the Government knew that he had no predisposition to engage in illegal activity, for in 1978 he had refused when undercover agents had attempted to involve him in a scheme to sell certificates of deposit overseas. In conclusion, Rep. Jenrette requested an extensive evidentiary hearing to determine whether overreaching had occurred.

---

[3] 18 U.S.C. § 201(c) provides: Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive, or agrees to receive anything of value for himself or for any other person or entity, in return for:

> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) being induced to do or omit to do any act in violation of this official duty shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

[4] 18 U.S.C. § 2 provides: (a) Whoever commits an offense against the United States or aids, abets, counsel, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[5] The Speech or Debate Clause of the U.S. Constitution provides that "for any Speech or Debate in either House, [U.S. Senators and U.S. Representatives] shall not be questioned in any other Place." [art. I, § 6, cl. 1]

In addition to seeking dismissal or an evidentiary hearing on the basis of overreaching and dismissal on the basis of entrapment, Rep. Jenrette's July 14, 1980 motion also sought dismissal on the basis of prejudicial pre-indictment publicity. In this regard, Rep. Jenrette claimed that someone connected with the ABSCAM investigation deliberately notified the national television networks that the FBI would send two agents to Rep. Jenrette's home on February 2, 1980. Accordingly, when the agents arrived, television crews were on Rep. Jenrette's front lawn ready to cover the event. The defendant further stated that FBI Director William Webster was quoted by the media as saying that the Government had a strong case against Rep. Jenrette. This statement, charged Rep. Jenrette, and the leak to the television networks regarding his February 2, 1980 interrogation, occurred prior to indictment, and represented an extreme violation of Rule 6(e) of the Federal Rules of Criminal Procedure (regarding grand jury secrecy). Rep. Jenrette further claimed that such disclosures: (1) caused highly prejudicial publicity; (2) undermined the rule requiring secrecy throughout the grand jury process; and (3) violated his rights under the Fourth, Fifth, and Sixth Amendments to the Constitution. At a minimum, concluded Rep. Jenrette, the Department of Justice should be ordered by the court to show cause why these disclosures should not be the basis for a finding of contempt.

On August 5, 1980, the Government responded to Rep. Jenrette's July 14, 1980 motion to dismiss. Addressing first the defendant's allegations of overreaching and entrapment, the Government, while conceding that its agents did approach Rep. Jenrette, argued that videotape recorded meetings with the Congressman would clearly show that the agents did not threaten or intimidate the defendant, that they clearly spelled out the illegality of what they were proposing, and that the defendant was allowed the opportunity to consider the offer at a later date. Such conduct, claimed the Government, was no different from that of an undercover narcotics officer who approaches an individual and asks to purchase drugs. According to the Government, the only issue in either case is whether the individual who responds to the agent's invitation to commit the crime was predisposed to do so. Regarding Rep. Jenrette's argument that he was approached despite the Government's knowledge that he had previously refused to become involved in an unlawful scheme, the Government contended that court cases have held that it is permissible for Government undercover agents to initiate criminal activity even when there is no reason to believe that the defendant is engaged in wrongdoing. The Government concluded its argument by stating that if the court should decide that an evidentiary hearing on the matter was warranted, then such hearing should take place after trial because: (1) a pretrial hearing would make it more difficult to select an impartial jury because of the extensive news coverage which would be given the hearing; (2) the court's determination of Rep. Jenrette's overreaching claim would be avoided if Rep. Jenrette was found innocent; (3) a pretrial hearing would unnecessarily delay the trial; and (4) the court would be in a better position after trial to assess Rep. Jenrette's contentions, and a post-trial hearing would avoid the need to hear the same evidence twice since most of the facts relating to the Government's alleged misconduct would probably be presented during Rep. Jenrette's entrapment defense at trial.[6]

With respect to Rep. Jenrette's contentions regarding pre-indictment publicity, the Government began by admitting that Government sources were indeed responsible for serious leaks regarding ABSCAM. However, said the Government, it was highly unlikely that the grand jury was biased by news reports which primarily occurred four months prior to its deliberations. In addition, argued the Government, the evidence presented to the grand jury was certainly sufficient to establish probable cause to indict, and, in any event, dismissal of an indictment is improper unless the defendant can clearly show that the grand jury was improperly influenced in its actions.

On August 11, 1980, Rep. Jenrette filed a reply to the Government's August 5, 1980 response. The defendant took issue with the Government's contention that it is permissible for Government undercover agents to initiate criminal activity even without evidence of the defendant's predisposition to commit the crime. Instead, the defendant claimed that once the Government targets anyone for any reason and learns of a lack of predisposition to violate the law, it must turn its investigation elsewhere. Rep. Jenrette also argued that it would be "naive and insensitive" to follow the Government's recommendation that any overreaching hearing be held post-verdict. In Rep. Jenrette's view, the court was compelled to hold a hearing on the overreaching issue prior to submission of the case to the jury.

---

[6] Entrapment defenses are ordinarily presented during trial and decided by the jury.

By oral order of August 28, 1980, Rep. Jenrette's motion to dismiss due to prejudicial pre-indictment publicity was denied. In a written order of the same day, Judge Penn indicated that he would reserve ruling on the overreaching issue until evidence was introduced at trial. No ruling was made with respect to Rep. Jenrette's allegations of entrapment.

On September 3, 1980, Rep. Jenrette filed a motion to suppress certain videotapes and telephone recordings of his allegedly criminal activity. Like his July 14, 1980 motion to dismiss the indictment, the motion to suppress was based on allegations that the Government's conduct during the investigation was so outrageous as to violate the defendant's Fifth Amendment right to due process. In his supporting memorandum, Rep. Jenrette relied heavily on the holding in *Green v. United States,* 454 F.2d 783 (9th Cir. 1971). According to Rep. Jenrette, the *Greene* court listed five major factors probative of Government overreaching: (1) the agent initiated the contact; (2) the contact was of long duration; (3) the agent was substantially involved in the criminal activity; (4) the agent applied pressure to prod the defendant into illegal activity; and (5) the agent helped establish the illegal activity and the agent was the only illegal customer. According to Rep. Jenrette, the *Greene* criteria closely fit the factual situation of the present case.

Rep. Jenrette's trial began on September 5, 1980. Meanwhile, the Government, on September 8, 1980, responded to Rep. Jenrette's motion to suppress by claiming that Rep. Jenrette had made no specific attack on the propriety of the process which produced the materials he was seeking to suppress. Nor could he, said the Government, since all the recordings were made with the consent of at least one of the parties who was being recorded. Such one party consensual tape recordings, said the Government, are legally unassailable under 18 U.S.C. § 2511(2)(c) and many Supreme Court cases.

On September 8, 1980, Rep. Jenrette's motion to suppress was denied. No memorandum accompanied the court's order.

On September 12, 1980 (while the trial was still in progress), the Government filed a legal memorandum on the subject of entrapment (as opposed to overreaching). Rep. Jenrette, said the memorandum, had argued that in order to overcome his entrapment defense, the Government would have to prove that he was predisposed toward criminal conduct *prior* to the commission of the crimes charged. In its memorandum, the Government challenged this argument claiming instead that the FBI could properly have offered defendant Jenrette an opportunity to commit crimes even if it had no basis for believing that he had been engaged in criminal conduct in the past. According to the Government, although evidence of a defendant's prior criminality could be relevant to the question of a defendant's predisposition, other factors could also be relied upon to prove predisposition—factors such as: (1) the willingness of the defendant to discuss criminal acts with the undercover agent; (2) the efforts of the defendant to maintain contact with the agent; and (3) evidence that after the original criminal act, as proposed by the agent, was completed the defendant embarked on a second, self-initiated plan to perform another criminal act. Using these criteria, said the Government, it would become clear that Rep. Jenrette was predisposed to accept the bribes.

On October 7, 1980, the jury, which had been sequestered for the duration of the trial, found Rep. Jenrette and Mr. Stowe guilty on all counts.

Immediately after the jury returned its verdict, the court agreed to hear arguments on all outstanding motions on November 12 and 13, 1980. Among the outstanding motions was Rep. Jenrette's motion to dismiss on the basis of Government overreaching. (Apparently, at some point Judge Penn decided that this issue would be decided post-trial and not during the presentation of evidence as he had originally planned.)

The court conducted hearings on Rep. Jenrette's claims of overreaching on November 12 and 13, 1980, as scheduled. The hearings were reconvened on February 10, 1981 and adjourned on February 11, 1981. The hearings were reconvened on May 11, 1981 and were finally completed one week later.

At the conclusion of the hearings, the court instructed Rep. Jenrette to submit a memorandum addressing, among other things, the issues of overreaching and entrapment. Rep. Jenrette complied with the instruction by filing a 120 page memorandum on July 20, 1981.

Rep. Jenrette's July 20th memorandum began by describing, in general terms, the alleged improper overreaching practices engaged in by the Government during the course of the ABSCAM investigation:

> [I]t should be axiomatic that the proper role of law enforcement in a civilized society is the investigation and discovery of those engaged in criminal activity. Any system in which the discovery of crime relies solely upon the instigation of crime cannot long be expected to respect the rule of law.
>
> The FBI undercover operation now known as ABSCAM demonstrates some of the most serious dangers inherent in a law enforcement system that, without any meaningful supervision, viewed apprehension as so paramount that it was permitted to create an ongoing criminal enterprise for the sole purpose of testing public officials. While the defendant submits that the proper role of law enforcement is not, and should not be, that of a testor of the morality of any citizen, even if that premise is accepted for purposes of argument, it becomes clear that the FBI seriously abused its power in the present case. That abuse took the form of violations of statutory authority which revealed a shocking callousness to the rights of targets and defendants and a total indifference to those protections afforded any citizen in even the most simple criminal investigation. It is a case of where, in the government's apparent view, the ends justified the means. It was the government's myopic march towards that end however which violated the very same public trust that the ABSCAM operation misled the public into believing it had protected. [Post Hearing memoran-

> dum in Support of Defendant Jenrette's Motions to Dismiss and for New Trial July 20, 1981, at 5-6]

In support of his contentions, Rep. Jenrette made six basic points. First, he alleged that the individuals responsible for the ABSCAM undercover operation made a number of organizational and operational decisions designed "solely for the purpose of immunizing the investigation from subsequent review and responsibility." [*Id.* at 10] For example, said the defendant, Mr. Weinberg and Mr. Stowe were at liberty to approach Members of Congress as they saw fit. According to Rep. Jenrette, the transcripts of the testimony taken during his trial revealed that the decision to investigate him was based on Mr. Stowe's allegations to Mr. Weinberg that Rep. Jenrette would accept a bribe; yet the "FBI made no attempt to even examine these allegations—much less confirm them." [*Id.* at 11] Further, said the defendant, the testimony of Mr. Weinberg's supervisor, FBI Agent Amoroso, indicated that, absent a tape recording, Agent Amoroso had no way of knowing what Mr. Weinberg said to Mr. Stowe. Thus, "Any attempt to obtain the details of the initial middleman discussions (which may or may not involve outrageous promises of wealth, jobs, or threats by Weinberg) is now covered by Amoroso's testimony that he relied strictly upon Weinberg's word on the initial contacts." [*Id.* at 13] In addition, claimed Rep. Jenrette, the ABSCAM investigators made very few written records during the course of the investigation. In fact, "Amoroso testified at trial he made *absolutely* no notes of his discussions with Weinberg." [*Id.* at 15] It was therefore Rep. Jenrette's conclusion that "the ABSCAM operation both by design and operation served to frustrate the goals of the judicial process." [*Id.* at 19]

Second, Rep. Jenrette contended that the Congressional committees that held hearings on the ABSCAM operation were told by Justice Department officials that certain investigative guidelines and review procedures were used during the investigation when in fact they were not. For example, said the defendant, on March 4, 1980 both FBI Director William Webster and Assistant Attorney General Philip Heymann told the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee that adequate safeguards and guidelines were in place during the ABSCAM investigation to prevent abuses by unscrupulous middlemen. According to Rep. Jenrette, Mr. Heyman told the Subcommittee that one such safeguard was the avoidance of offering excessively high inducements. Rep. Jenrette quoted Mr. Heyman as stating:

> The opportunities for illegal activity created in the course of an undercover operation should be only about as attractive as those which occur in ordinary life—because the object of a decoy undercover operation is to apprehend only those criminal actors who are likely to have committed or to commit similar criminal conduct on other occasions. Offering too high a price for stolen goods in a fencing operation, or pressing a licensing inspector too vigorously to "work something out" about a licensing violation are inducements we would avoid for fairness reasons. [*Id.* at 22-23]

But despite these public assurances, said Rep. Jenrette, "the government's own evidence establishes that the attitude of the undercover operatives was to offer *any amount* of money that would elicit a commitment." [*Id.* at 23] Thus, Agent Amoroso allegedly "told Rep. Jenrette that he could 'name his figure.'" [*Id.*] Moreover, "not even Agent Amoroso could testify as to what was promised to Mr. Stowe by Weinberg. Weinberg, not surprisingly, could only recall conversations with Stowe that were tape recorded." [*Id.* (transcript citations omitted)] Rep. Jenrette further alleged that contrary to what Mr. Heyman and Mr. Webster told the Subcommittee, the FBI made no independent evaluation of middlemen information regarding Rep. Jenrette's willingness to accept a bribe. Rep. Jenrette thus concluded that "the safeguards that the FBI promised Congress either never existed or did not operate in the real world." [*Id.* at 26]

Rep. Jenrette's third main argument was that the Justice Department exercised no effective review of the ABSCAM investigation. For example, the Undercover Review Committee, which was composed of officials from the FBI and the Department of Justice, was designed, according to Rep. Jenrette, to ensure that all undercover operations would be carefully planned and conducted. However, since "no written reports [or] oral presentations were [given to the committee] . . . the committee made no review until after the fact and . . . its purpose was informational rather than supervisory." [*Id.* at 31–32] Equally alarming, argued Rep. Jenrette, was the fact that Mr. Weinberg was the *de facto* leader of the operation: "Even Agent Amoroso admitted at the trial that he had no way of knowing what Weinberg was proposing to middlemen, and that Weinberg waş unsupervised a good portion of the time." [*Id.* at 34 (transcript citations omitted)] In support of his argument that Mr. Weinberg was the leader of the investigation, Rep. Jenrette made several points:

> One of the most obvious signs of Weinberg's dominance of the operation is his salary. Even Mr. Amoroso admitted at trial that $133,000.00 over an 18 month-period was considerably more that he, as Weinberg's FBI supervisor earned. This figure, later amended by post-trial government disclosures, did not include "expenses" which could be at best termed generous.
>
> Even more suspect is how the FBI reacted to Weinberg's salary. Anthony Amoroso, who after one meeting, recommended a salary increase from $1,000 to $3,000 per month, claimed at trial to know nothing about Weinberg's salary . . . Thus it is interesting to note that when Amoroso and Weinberg first met the only thing they discussed (other than Weinberg's boyhood) was Weinberg's salary.
>
> The second indication of Weinberg's role as a leader in the operation can be found in the deference paid to Weinberg's style of operation. As the incident between Agent Good and Messrs. Plaza-Weir demonstrates,[7] the FBI was

---

[7] In his memorandum, Rep. Jenrette claimed that FBI Agent John Good, who was Agent Amoroso's supervisor, prevented Assistant U.S. Attorneys Plaza and Weir from questioning Mr. Weinberg.

> far more concerned with Weinberg's ruffled feathers than an inquiry into the truth. Moreover, even other FBI agents were not allowed to interview Weinberg for fear of upsetting him.
>
> This deferential attitude goes a long way in explaining the complete trust put in Weinberg's judgments. It also supplies the background as to why nothing was done to correct Weinberg's obvious failings as an investigator. Thus, when Amoroso testified that Weinberg did not turn tapes over to the FBI as soon as they were made because Weinberg himself did not "feel the need" to do so, the inability to control becomes clear. [*Id.* at 40–41 (transcript citations and footnotes omitted)]

In this same vein, Rep. Jenrette stated:

> When Mr. Puccio[8] testified that he could not attribute any of his initial information to anyone other than Weinberg, the danger of Weinberg the con-man is clearly present. The fact that Weinberg was compensated partially by bonus should raise further doubts. Added to this equation is the fact that no one checked any of the rumors supplied by Weinberg. Thus one reaches inevitable conclusion that Weinberg had substantially more control over the operation than did most of the employees of the Department of Justice. The possibility of such control being vested in Melvin Weinberg is outrageous. The decision to permit such control is not only outrageous government conduct but inexcusable neglect of the duty of law enforcement. [*Id.* at 36–37 (transcript citations and footnotes omitted)]

Rep. Jenrette's fourth point was that the Government's failure to monitor the ABSCAM investigation resulted in numerous investigative irregularities. One such alleged irregularity involved the FBI's informant file on Mr. Weinberg, which in Rep. Jenrette's view was "but a bare skeleton of what it should have been." [*Id.* at 45] The chief of the FBI's Informant Unit, said Rep. Jenrette, "testified that a 137 [informant] file should contain the following items which apparently . . . were not present: a 302 of any instructions given to an informant; a memo reflecting the fact the informant had been instructed on the elements of entrapment; and regular written informant reviews." [*Id.* at 46] Rep. Jenrette concluded that these omissions indicated that the Government "deliberately elected to violate its own precedent and refused to generate any material for the 137 file which could serve as a check on Mr. Weinberg's veracity." [*Id.*] Next, Rep. Jenrette claimed that no one involved in the investigation ever attempted to recover, or learn the contents of, three tapes stolen from Mr. Weinberg's suitcase at an airport in January 1980. Finally, the defendant stated that despite the fact that the FBI's Operations Manual requires FBI agents to record investigative notes on a Form 302 whenever an interview with a prospective witness or suspect may become the subject of court testimony, neither Agent Amoroso nor Agent Good prepared written records of any of the unrecorded telephone calls made by Mr. Weinberg to Mr. Stowe. This failure to take notes, insisted Rep. Jenrette, was not surprising, since the Justice Department had made "a deliberate decision not to establish a 'paper trail.'" [*Id.* at 57]

---

[8] Thomas P. Puccio, Attorney-in-Charge of the Justice Department's Organized Crime Strike Force for the Eastern District of New York, prosecuted the ABSCAM cases involving Congressmen Myers, Lederer, Murphy, and Thompson.

Rep. Jenrette's fifth argument was that the individuals responsible for the investigation violated a number of Federal statutes. According to Rep. Jenrette, in mid-1978 John Harmon of the Office of Legal Counsel in the Justice Department submitted a memorandum to the Attorney General in which he expressed his view that the FBI was conducting the ABSCAM investigation in probable violation of four Federal statutes: 31 U.S.C. § 484 (imposing on Federal officers a duty to transmit to the U.S. Treasury all monies received for the use of the United States); 18 U.S.C. § 648 (regarding embezzling or depositing funds belonging to the United States); 31 U.S.C. § 665(a) (prohibiting officers of the United States from entering into unauthorized contracts involving the payment of Government funds); and 41 U.S.C. § 11(a) (prohibiting entering into a contract on behalf of the United States without authorization).

Rep. Jenrette's sixth main assertion was that the Government lacked a reasonable basis for bringing him into the ABSCAM investigation. In support of this allegation of improper targeting, Rep. Jenrette stated that his reluctance to become involved in undercover operations prior to ABSCAM, coupled with the fact that "not one government witness has given one factual predicate for suspecting that . . . Rep. Jenrette would do wrong," proved that he "was neither corrupt nor corruptible." [*Id.* at 73–74]

Rep. Jenrette's July 20th memorandum concluded its discussion of Government overreaching by calling on the court to either: (1) dismiss the indictment on the grounds that it was the product of evidence procured in violation of Rep. Jenrette's due process rights; or (2) grant a new trial at which the evidentiary fruits of the Government's constitutionally impermissible activities would not be introduced into evidence. In support of these requests, Rep. Jenrette stated that the decision in *United States v. Twigg,* 588 F.2d 373 (3rd Cir. 1978) provided a model for the appropriate inquiry in the present case:

> In *Twigg* the Court reviewed in detail the circumstances reflecting on the fairness of the investigation and prosecution. The Court considered it significant that the government informant approached the defendant with a proposal to manufacture amphetamines, and that the government agent, not the defendant, instigated the allegedly criminal activity. In the present case as well, the criminal activity was instigated by the government and sustained by the middleman at the government's direction. In *Twigg,* the Court found that there was no preexisting criminal enterprise, as was also the case here. Further, the defendant in *Twigg* was "lawfully and peacefully minding his own affairs," when the "conduct of the government agents . . . generated new crimes merely for the sake of pressing criminal charges against him." *Id.* at 381. The

> same was true of Messrs. Jenrette and Stowe here. In fact, unlike the defendant in *Twigg,* neither Jenrette nor Stowe had any prior criminal involvement that raised any suspicion of corruptibility. Finally, the government agents in *Twigg* provided the idea for the crime, the location for the activities, and the money for the operations. Again, the same is true here. [*Id.* at 79]

Having concluded his arguments on the subject of overreaching, Rep. Jenrette, in his July 20th memorandum, proceeded to address the issue of entrapment. Quite simply, Rep. Jenrette stated that a review of the complete record established, as a matter of law, that the undercover operation had entrapped him. Although the entrapment issue had been presented to the jury for its consideration, said the defendant, Judge Fullam's decision in *United States v. Jannotti,* 501 F.Supp. 1182 (E.D. Pa. 1980) demonstrated that the issue could be resolved by the court as a legal matter even in the face of a jury verdict adverse to the defendant. In the instant case, continued Rep. Jenrette, a finding of entrapment was necessary for two reasons. First, the Government had failed to show beyond a reasonable doubt that he was predisposed to commit any of the charged offenses. Second, it was impermissible for the Government to attempt repeatedly to induce him to commit a crime. On this second point Rep. Jenrette claimed that the undercover operation attempted to induce him to commit a crime on four different occasions. His position was that "the government, after the first three attempts proved unsuccessful, cannot be permitted to base a prosecution upon a complete fourth attempt." [*Id.* at 98] In support of this contention, Rep. Jenrette cited two cases which he had relied upon in support of his July 14, 1980 motion to dismiss: *United States v. Archer, supra,* and *Hampton v. United States, supra.*

On August 31, 1981, the Government filed a memorandum in opposition to Rep. Jenrette's motions to dismiss and for a new trial. The Government's memorandum began with a detailed description of the history of the ABSCAM investigation, and more particularly, the investigation of Rep. Jenrette.[9]

Next, the Government addressed Rep. Jenrette's claims regarding entrapment. Quoting *Sherman v. United States,* 356 U.S. 364, 372 (1932) the Government claimed that entrapment exists " 'when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' " [Government's Memorandum in Opposition to Defendants' Motions To Dismiss and Motion for a New Trial, August 31, 1981, at 25] Thus, said the Government, for entrapment to be established: (1) the Government must originate the crime and induce the defendant to commit it; and (2) the defendant must be an innocent person who would not have committed a crime of this sort had he not been thus induced. In *United States v. Burkley,* 591 F.2d 903 (D.C. Cir. 1978), continued the Government, the court made it clear that a " 'solicitation, request, or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement.'" [*Id.* at 26, quoting *Burkley* at 913] In any event, said the Government, the question of inducement rested on disputed facts, and thus was properly submitted to the jury for its resolution.

---

[9] Portions of this material are printed in *Court Proceedings and Actions of Vital Interest to the Congress,* September 1, 1981, beginning at page 521.

With respect to predisposition, the Government asserted:

> [I]t is clear that the government can rely on a variety of factors to meet its burden, including proof of prior and subsequent similar criminal acts by the defendants. It is also perfectly proper for the government to prove predisposition by relying exclusively on evidence that demonstrates a willingness on the part of the defendants to commit the crimes charged *by their ready response* to the inducement. *Burkley* at 916. Both defendants pay lip service to this familiar law but seem to have difficulty accepting the fact that *all* the government need to have proved to establish that they were sufficiently predisposed was their willing and eager response to the government's offer. [*Id.* at 27]

The Government then proceeded to compare the evidence of predisposition presented to the jury in the *Burkley* case with the evidence of predisposition presented to the jury in the instant case:

> In *Burkley,* the court enumerated the facts that demonstrated that the defendant was predisposed to twice sell drugs to an undercover agent:
>
> "(1) the defendant was initially willing to discuss the possibility of a narcotics transaction with the undercover agent;
>
> "(2) the defendant voluntarily remained in contact with the agent; and
>
> "(3) the defendant subsequently initiated a second sale to the agent two months after the first sale."
>
> The predisposition evidence in this case is a striking parallel to the facts upheld in *Burkley.* The videotapes reveal that both Jenrette and Stowe were initially willing to discuss the receipt of a bribe at the December 4, 1979 meeting. Stowe exhibited absolutely no qualms about receiving money for his friend's official acts. Indeed, he literally had to be dissuaded several times by Amoroso from coming prematurely to the townhouse to pick up the cash. Jenrette came to the townhouse knowing that money would be offered to him in return for a legislative act. Jenrette's only hesitation in accepting the offer was that he wanted insulation from the actual passage of money. He "solved" this problem by utilizing Stowe as the "bagman" to handle the money. This "solution," his statement that "I've got larceny in my blood," his concern about the serial numbers on the $100 bills being traceable, and his assumption that he was dealing with criminals evince his ready response to the government inducement. There can be no doubt that each defendant "readily responded to the opportunity furnished by the . . . agents to commit the for-

> bidden acts for which he is charged." *United States v. Hansford,* 303 F.2d 219, 222 (D.C. Cir. 1962). [*Id.* at 28]

The Government concluded its discussion of entrapment by asserting that a court's power to overturn a jury's finding that no entrapment occurred was very limited. Citing *United States v. Spain,* 536 F.2d 170, 173 (7th Cir. 1976), the Government stated that entrapment as a matter of law is established only when the absence of predisposition appears from uncontradicted evidence. Having failed to meet this test, and having been "captured on tape flagrantly talking about, encouraging, and committing serious criminal acts," Rep. Jenrette and Mr. Stowe "merited only guilty verdicts, not a finding of entrapment as a matter of law." [*Id.* at 29]

With respect to overreaching (the so-called "due process defense"), the Government stated that the two key U.S. Supreme Court cases on overreaching, *United States v. Russell, supra,* and *Hampton v. United States, supra,* neither firmly established the existence of a due process defense nor clarified the boundaries and limitations of any such defense. In any event, continued the Government, even if the due process defense were to be recognized, it would be confined to the most outrageous Government conduct, "marked by a flagrant disregard for common decency and individual rights." [*Id.* at 34] Next, the Government discussed several "due process" cases, including *United States v. Johnson,* 565 F.2d 179 (1st Cir. 1977); *United States v. Ordner,* 554 F.2d 24 (2d Cir. 1976) *cert. denied,* 434 U.S. 824 (1977); *United States v. Quintana,* 508 F.2d 867 (7th Cir. 1975); *United States v. Reynoso-Ulloa,* 548 F.2d 1329 (9th Cir. 1977); and *United States v. Quinn,* 543 F.2d 640 (8th Cir. 1976). These cases, and especially *United States v. Leja,* 563 F.2d 244 (6th Cir. 1977), made it clear, claimed the Government, that the only circuit court case in which the due process defense prevailed, *United States v. Twigg, supra,* was "an aberration from the usual judicial view of the due process defense." [*Id.* at 38 (footnote omitted)]

The Government concluded its preliminary discussion of overreaching by asserting that under *United States v. Payner,* 447 U.S. 727 (1980) and *United States v. Morrison,* 449 U.S. 361 (1981) it was clear that:

> [n]o relief on due process grounds is available to a defendant without a showing of government conduct that violated *his constitutional rights* and prejudiced him at trial. That is, *Payner* and *Morrison* are a complete bar to relief for a defendant who can only establish that another's . . . rights were violated during an investigation. [*Id.* at 39]

Turning to Rep. Jenrette's specific charges of overreaching, the Government began with a discussion of Rep. Jenrette's allegation of improper targeting. The Government argued, as it had in its September 12, 1980 memorandum on entrapment, that "it is entirely permissible for Government undercover agents to initiate criminal activity even when there is no reason to believe that the defendant had been engaged in wrongdoing in the past." [*Id.* at 41] In support of this assertion the Government cited *United States v. Swets,* 563 F.2d 989 (10th Cir. 1977); *United States v. Martinez,* 488

F.2d 1088 (9th Cir. 1973); *United States v. Jenkins,* 480 F.2d 1198 (5th Cir. 1973); *United States v. Silver,* 457 F.2d 1217 (3rd Cir. 1972); and *United States v. Rodrigues,* 433 F.2d 760 (1st Cir. 1970). However, continued the Government, even if the court was to hold that the ABSCAM investigators had to have had a reasonable suspicion that Rep. Jenrette would commit a crime before approaching him, the "reasonable suspicion" standard was easily met:

> The prior and ongoing investigation lent weight to Stowe's representations about Jenrette. Stowe's representations about Jenrette's willingness to engage in bribery were timely and specific. Indeed, no bribe offer was authorized by the government until Stowe confirmed that Jenrette knew the details of the bribery arrangement and had agreed to be a willing participant. Stowe's confirmation was corroborated by Jenrette's behavior at the beginning of the December 4 meeting, *before* any money was offered. For Jenrette too, there was an overwhelming likelihood before the bribe was offered that he would be responsive to the criminal approach.[10] [*Id.* at 47]

Next, the Government addressed Rep. Jenrette's assertions concerning excessive inducements. It seemed, said the Government, that Rep. Jenrette was taking "the anomalous position that public officials can be prosecuted for taking small bribes, but not for taking large ones." [*Id.* at 48–49] In any event, said the Government, U.S. District Court Judge George Pratt, who on July 24, 1981 rejected the due process claims of the ABSCAM defendants in New York, had persuasively explained why the sizes of the bribes offered to the ABSCAM defendants were not excessive, and perhaps not even relevant. (Judge Pratt's July 24th memorandum is printed at page 419 of *Court Proceedings and Actions of Vital Interest to the Congress,* September 1, 1981.)

The Government next addressed Rep. Jenrette's allegations concerning Justice Department review and control of the investigation. First, with respect to the Undercover Review Committee, the Government maintained that this body was created in the summer of 1979 to pass upon proposed *future* operations, and therefore had no responsibility with respect to the ABSCAM investigation which began before mid-1979. Turning to Rep. Jenrette's claim that Mr. Weinberg was the *de facto* leader of ABSCAM, the Government openly admitted that "Weinberg was, simply stated, a crook who got caught and who sought to mitigate his troubles by working for the FBI. He worked effectively and the Government paid him well for his performance." [*Id.* at 52] However, said the Government, "In no case that we know has a court overturned a jury's verdict on the basis of the 'unsavoriness' of the Government informant." [*Id.*] The Government further stated that neither Federal statutory law nor judicial case law places any limit on how much the Government can pay an informant. At any rate, said the Government, Mr. Weinberg's fee was reasonable. Moreover, Mr. Weinberg's method of operation was consistent with the way informants normally operate:

---

[10] According to the Government's memorandum (at p. 46), by December 4, 1979, the day Rep. Jenrette was offered a bribe, the FBI knew the following about him:

1. That he was associated with Mr. Stowe;
2. That Mr. Stowe had said that Rep. Jenrette was willing to engage in an illegal deal involving certificates of deposit;
3. That he had been the subject of a land fraud/bank fraud investigation in South Carolina;
4. That he was then the subject of a drug smuggling investigation, an obstruction of justice investigation, and other investigations involving false travel vouchers to Congress and illegal campaign contributions;
5. That Mr. Stowe had repeatedly represented that Rep. Jenrette knew of the bribe offer and would be a willing participant; and
6. That when Rep. Jenrette first came to the townhouse, he talked freely about the 'immigration problem.'

> Typically, informants are "sent out on the street" to generate activity in an area of law enforcement interest. The "junkie" informant or the informant looking for illegal arms will let it be known that he is looking for a buy. Weinberg, at the outset of the investigation, merely let it be known that he had wealthy employers who were looking for "investments" and later that his employers might be in need of private immigration bills.
>
> Again typically, the informant returns to the government with intelligence that he has picked up that the government then uses to shape the course of its investigation. The government necessarily relies on the judgment of its informant, who receives a mass of information "on the street" and transmits to the government what he chooses to transmit. The FBI's use of Weinberg did nothing more than follow this typical pattern. He had contact with many, many people in the early stages of the investigation. The FBI relied on him to advise them if the proposals he received had the potential to lead to criminal activity. With Weinberg, and unlike many informants, the FBI checked his recommendations with the many tapes he produced. It was *not* just Weinberg's opinion the FBI had when deciding how to view a middleman during the investigation. In most instances, and certainly with Stowe, they had the middleman's own representations on tape to use to help to decide how best to proceed. [*Id.* at 53–54]

After explaining that Mr. Weinberg was never allowed to take any significant investigative step without prior approval by the FBI, the Government stated that the important question was whether "anything significant [would] have occurred differently in this case had Weinberg been supervised every minute of the day and been given no discretion at all." [*Id.* at 55] Obviously, said the Government, the answer was "No." Thus, Mr. Weinberg's supervision "affected none of the legally significant acts of the defendants and this fact is a bar to relief for the defendants on this issue." [*Id.*]

Next, the Government responded to Rep. Jenrette's allegation that the Government's failure to monitor the ABSCAM investigation resulted in numerous investigative irregularities. Although the Government denied that any significant investigative violations occurred, it took the position that even assuming, *arguendo,* that such violations did occur, "the infractions of in-house rules by the FBI or Justice . . . cannot justify dismissal of an indictment unless they amount to *constitutional violations. United States v. Caceres,* 440 U.S. 741 (1979)." [*Id.* at 55] Furthermore, claimed the Government, "not only do the claimed infractions need to rise to constitutional dimensions for relief, they must also violate the *constitutional rights of the defendants. United States v. Payner, supra: United States v. Morrison, supra.*" [*Id.* at 56–57] Using these tests, asserted the Government, it was clear that Rep. Jenrette's arguments lacked merit:

> A showing that Weinberg could have been better supervised in 1978 or that Amoroso should have made a 302 on a particular occasion serves the defendants not at all unless they show *real,* not hypothetical, prejudice to themselves. Since there is not a hint of evidence in the record that any constitutional right of either defendant was violated or that any procedure in the investigation resulted in the production of unreliable evidence that was used against the defendants, their effort to raise the banner of alleged violation of in-house rules, regulations and guidelines must prove unavailing. [*Id.* at 57]

With respect to Rep. Jenrette's claims regarding the stolen tapes and the Government's alleged decision not to establish a paper trail, the Government asserted that Rep. Jenrette made "no credible showing that something not produced redounded to [his] detriment." [*Id.* at 66] With respect to Rep. Jenrette's claim that agents Amoroso and Good purposely failed to take notes, the Government said, "It is true that there were many meetings within the Justice Department during the Abscam investigation wherein Justice personnel . . . took no notes. We submit that it is totally unrealistic to expect that they would take notes on such occasions and totally incorrect to suggest that they had a legal obligation to do so." [*Id.* at 63] With respect to the missing tapes the Government said:

> We realize, of course, that the lost airport tapes immediately bring to the fore *United States v. Bryant,* 439 F.2d 642 (D.C. Cir. 1971), a case which imposes upon the government an obligation to preserve all evidence which might be favorable to the defense. *Bryant* coupled this rule with a pragmatic test for when sanctions are to be imposed against the government for failure to preserve evidence. The court must balance:
>
> the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial.
>
> 439 F.2d at 653.
>
> There is no evidence that the three or four lost tapes were willfully destroyed. The view of the tapes most favorable to the defense is that the government transported the tapes from Florida to New York in a negligent manner and that when the government learned of the loss and learned from Weinberg that the contents of the tapes were insignificant, its investigation into the loss was perfunctory. The circumstances of the loss and the government's response cannot obscure (1) the fact that there is no credible evidence that the lost tapes had anything to do with

> the defendants; and (2) the overwhelming evidence of guilt adduced at trial. There is much authority that if the government loses evidence inadvertently, sanctions will rarely be imposed, especially where evidence of guilt is strong. See e.g., *United States v. Bundy,* 472 F.2d 1266 (D.C. Cir. 1972); *United States v. Miranda,* 526 F.2d 1319 (2d Cir. 1975); *Armstrong v. Collier,* 536 F.2d 72 (5th Cir. 1976); *United States v. Maynard,* 476 F.2d 1170 (D.C. Cir. 1973); *United States v. Harrison,* 524 F.2d 421 (D.C. Cir. 1975). [*Id.* at 65-66]

Turning next to Rep. Jenrette's allegations regarding violations of numerous Federal statutes, the Government asserted that by December 1979, when Rep. Jenrette accepted the bribe, "the Abscam operation was in conflict with none of the laws cited in the Harmon document." [*Id.* at 70]

On September 11, 1981, Rep. Jenrette filed a reply memorandum reiterating many of his previous allegations regarding the "outrageous" conduct of the Abscam investigators.

On September 22, 1981, Rep. Jenrette's motion to dismiss on the basis of Government overreaching was taken under advisement.

Status—The case is still pending in the U.S. District Court for the District of Columbia. There has been very little docketed activity in the case during 1982.

United States v. Myers

No. 81-1342 (2d Cir.)

On May 27, 1980, U.S. Representative Michael O. Myers of Pennsylvania was indicted by a Federal grand jury in the U.S. District Court for the Eastern District of New York. Indicted with Rep. Myers were Angelo J. Errichetti, the Mayor of Camden, New Jersey and a member of the New Jersey State Senate; Howard L. Criden, a Philadelphia attorney; and Louis C. Johanson, a member of the Philadelphia City Council and a member of Mr. Criden's law firm. [Criminal Case No. 80-00249 (E.D.N.Y.)]

Count I of the three count indictment charged the defendants with conspiracy,[1] contrary to 18 U.S.C. § 371.[2] Specifically, it was alleged that on August 5, 1979 defendant Errichetti met with "Tony DeVito" and Melvin Weinberg and told them that Rep. Myers, in return for cash payments, would assist businessmen from the Middle East to enter and remain in the United States. Purportedly, DeVito and Mr. Weinberg were agents of these foreign businessmen. In reality, however, DeVito was Anthony Amoroso, Jr., a Special Agent of the Federal Bureau of Investigation ("FBI"), and Mr. Weinberg was a private citizen assisting the FBI. Also purportedly serving as agents for the foreign businessmen were "Ernie Poulos" and "Michael Cohen." In reality, however, these individuals were Ernest Haridopolos and Michael Wald, respectively, Special Agents of the FBI.

---

[1] Specifically, conspiracy to violate 18 U.S.C. § 201 (bribery and fraud).

[2] 18 U.S.C. § 371 provides: If two or more persons conspire either to to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Allegedly, on August 22, 1979, defendants Myers and Errichetti had a meeting with Mr. Weinberg and DeVito during which Rep. Myers received $50,000. In return, said Count I, Rep. Myers assured DeVito and Mr. Weinberg that he would introduce in Congress private immigration bills designed to ensure that the foreign businessmen would be allowed to immigrate to the United States. The indictment further claimed that Rep. Myers retained $15,000 of the $50,000 received, and that the remaining $35,000 was divided among defendants Criden, Errichetti, and Johanson. Having understood that he was to receive $50,000, not $15,000, Rep. Myers, said Count I, subsequently demanded an additional $35,000 from Poulos and Cohen as a condition to his rendering immigration assistance to the foreign businessmen.

Count II charged that Rep. Myers, by soliciting and receiving payment in return for his promise to provide immigration assistance, committed bribery, contrary to 18 U.S.C. § 201(c).[3]

The remaining defendants were charged with aiding and abetting Rep. Myers in the commission of bribery. Accordingly, they were charged with criminal liability as principals, pursuant to 18 U.S.C. § 2.[4]

Count III charged that on August 22, 1979 the defendants traveled in interstate commerce (from New Jersey and Pennsylvania to New York) with intent to promote an unlawful activity, to wit, bribery. Such travel was said to violate 18 U.S.C. § 1952 (Travel Act).[5]

On June 5, 1980, Rep. Myers entered a plea of not guilty to all counts.

On July 1, 1980, the Committee on Standards of Official Conduct of the U.S. House of Representatives ("Committee") filed an application for an order authorizing the Department of Justice to disclose to the Committee ABSCAM-related material (except grand jury transcripts) in the custody of the Department or the grand jury. The application explained that under clause 4(e)(1) of Rule X of the Rules of the House, the Committee was authorized to investigate alleged violations by Members of their official duties. The Committee also stated that on March 27, 1980, the House adopted Resolution 608 which specifically directed the Committee to conduct a full investigation into the ABSCAM affair and to report any recommendations for disciplinary action to the full House. The Committee further stated that the information sought through the instant application was essential if Congress was to carry out its constitutional function of imposing discipline on its Members. The application concluded by noting that the Committee would take precautions—including requiring Committee Members and Committee counsel to execute confidentiality agreements—to prevent unnecessary or inappropriate disclosures of materials and information received. On July 4, 1980, the Committee's application was granted.

---

[3] 18 U.S.C. § 201(c) provides: Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of fraud, on the United States; or

(3) being induced to do or omit to any act in violation of his official duty, shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

[4] 18 U.SC. § 2 provides: (a) Whoever commits an offense against the United States or aid, abets, counsels, commands, induces or procures its commision is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[5] 18 U.S.C. § 1952 provides, in pertinent part: (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

On July 10, 1980, Rep. Myers filed a motion to dismiss in which he attacked the indictment on a variety of grounds. It was his belief that the indictment: (1) violated the doctrine of separation of powers and the Speech or Debate Clause of the U.S. Constitution;[6] (2) failed to state an offense; (3) was predicated on an unconstitutional statute, to wit, 18 U.S.C. § 201; and (4) raised political questions and was therefore nonjusticiable.

Regarding the first claim, Rep. Myers stated that the grand jury based its indictment of him, in significant part, on documents and other information that were privileged under the Speech or Debate Clause. Specifically, the defendant alleged that Federal law enforcement officials obtained information regarding his past activities regarding private immigration bills from the House Information System ("HIS") and presented this information to the grand jury. Rep. Myers also claimed that four members of his legislative staff, pursuant to subpoenas *duces tecum,* were ordered to transmit his appointment books, travel logs, and telephone logs to the grand jury, and that apparently the staff members complied. In arguing that this HIS information and the official logs and books reflected instances of legislative acts, and therefore could not constitutionally be scrutinized under the Speech or Debate Clause, Rep. Myers relied heavily on the holding in *In Re: Grand Jury Investigation,* 587 F.2d 589 (3rd Cir. 1978). Finally, Rep. Myers claimed that it appeared that the grand jury was shown videotapes of him. Allegedly, these videotapes should not have been shown because they "contained references to past legislative acts and the motivation therefor, specific references to speech or debate on the floor of the House of Representatives, and references to numerous acts which are indeed integral parts of the deliberative and communicative process . . ." [Motion of Michael O. Myers to Dismiss Indictment, July 10, 1980, at 14] Rep. Myers stated that when an indictment has been tainted by a grand jury's consideration of matters protected by the Speech or Debate Clause, the only remedy is dismissal. In support of this contention, Rep. Myers cited the opinion of U.S. District Court Judge Curtis Meanor in *United States v. Helstoski.* (See page 71 of *Court Proceedings and Actions of Vital Interest to the Congress,* March 1, 1981 for a discussion of that case.) Rep. Myers' final point was that even if his indictment was not tainted by the consideration of legislative acts, it would still have to be dismissed because in order to defend himself at trial he would have to introduce evidence of his legislative acts. In effect, said Rep. Myers, a trial on this indictment would impermissibly force him to either waive his Speech or Debate Clause protection or relinquish his due process right to present a full and complete defense.

---

[6] The Speech or Debate Clause of the U.S. Constitution provides that "for any Speech or Debate in either House, [U.S. Senators and U.S. Representatives] shall not be questioned in any other Place." [art. I, § 6, cl. 1]

Next, the defendant asserted that the indictment failed to state an offense. His argument was that 18 U.S.C. § 201(c) (bribery) requires proof that the defendant corruptly agreed to be influenced in his performance of an official act. If no official act has been or could be performed, reasoned Rep. Myers, then no bribery could be charged. Thus, said the defendant, this indictment was defective because it was impossible for him to render immigration assistance (i.e. perform an official act) for the benefit of foreign businessmen who in fact did not exist.

Rep. Myers' third argument was that section 201 was unconstitutional both on its face and as applied. Regarding facial validity, Rep. Myers stated that the passage of section 201 was an unconstitutional infringement upon the separation of powers doctrine, the Speech or Debate Clause, and the Punishment Clause.[7] In Rep. Myers' view, the separation of powers doctrine "provides that one branch of government may not intrude into the exclusive functioning of another branch . . . yet this is precisely what the instant legislation attempts to do in diverting consideration of matters involving the behavior of House Members, to branches other than the legislative branch." [Motion of Michael O. Myers to Dismiss Indictment, July 10, 1980 at 25–26] With respect to section 201's validity under the Speech or Debate Clause, Rep. Myers said:

> [T]he Speech or Debate Clause states that no legislator may be questioned in any arena regarding speech or debate. Defendant suggests that the passage of this legislation invaded this protection for it provided for judicial scrutiny of and executive enforcement of acts coming within the purview of the Speech or Debate Clause. A constitutional provision cannot be so infringed upon by a legislative enactment, absent a constitutional amendment. [*Id.* at 24]

Regarding the Punishment Clause, Rep. Myers said:

> This Constitutional provision thus sets forth a mandated procedure by which House Members can maintain internal control over their body. This Constitutional provision cannot be so ignored by the passage of Section 201, which directly violates the underpinning of the Punishment Clause, and delegates to other branches of government, the responsibility for punishing and examining House Members for alleged disorderly conduct. [*Id.* at 25]

---

[7] The Punishment Clause of the U.S. Constitution provides: "Each House may . . . punish its Members for disorderly Behavior." [art. I § 5, cl. 2]

Next, Rep. Myers claimed that section 201 was applied in an unconstitutional manner in this case. His argument was that the present indictment exemplified a deliberate pattern of selective enforcement, and that the conduct of the Government "was manipulative, intentional, and carefully planned . . . to intimidate, harass and compromise members of the Legislative Branch." [*Id.* at 33] The framers of the Constitution, said Rep. Myers, formulated the Speech or Debate Clause in order to protect legislators against the type of intimidation used by the Government in the instant case. To allow the Government to invoke section 201 against him, concluded Rep. Myers, would thus violate the Speech or Debate Clause and would serve to erode the independence of the Legislative branch. Rep. Myers also claimed that the indictment, as framed, contained numerous references to legislative acts. Consequently, the Government would have to introduce at trial evidence protected by the Speech or Debate Clause. Rep. Myers' final argument concerning section 201 was that Congress never intended that the statute would be used to permit Government agents to establish wholly fictitious criminal enterprises in order to tempt Members of Congress to accept bribes.

The fourth major point raised by Rep. Myers in his June 10, 1980 motion to dismiss was that the instant prosecution presented a nonjusticiable political question. First, said Rep. Myers, there was a textually demonstrable constitutional commitment of the issue to a coordinate political department in that the Punishment Clause and the Speech or Debate Clause provide for the resolution of problems of the type presented in the indictment. Second, it would be impossible for the court to resolve the issues in this case without showing a lack of respect for either the Legislative or Executive branch. Third, judicial resolution of the issues would not necessarily be the final word since Rep. Myers would also be subjected to disciplinary action by the House of Representatives. Thus, judicial resolution would present a "potentiality of embarrassment from multifarious pronouncements by various departments on one question." [*Id.* at 37, quoting *Baker v. Carr,* 369 U.S. 186, 217 (1962)]

On July 11, 1980, the court, Judge Jacob Mishler presiding, denied Rep. Myers' July 10, 1980 motion to dismiss. No memorandum accompanied the court's decision.

On July 18, 1980, Rep. Myers appealed the denial of his motion to dismiss to the U.S. Court of Appeals for the Second Circuit.

On August 8, 1980, the court of appeals issued its decision. [*United States v. Myers,* 635 F.2d 932 (2d Cir. 1980] In an opinion delivered by Circuit Judge Jon O. Newman, the decision of Judge Mishler was affirmed. Turning first to the appealability of Judge Mishler's decision, the circuit court likened the instant case to *Helstoski v. Meanor,* 442 U.S. 500 (1979). In *Helstoski* the U.S. Supreme Court had ruled that a Member of Congress was entitled to appeal, in advance of trial, the denial of a motion to dismiss, where the motion alleged violations of the Speech or Debate Clause. The Supreme Court had reasoned that the Speech or Debate Clause was designed to protect Members not only from the results of litigation, but also from the burden of defending themselves. Thus, said the Supreme Court, if a Member is to enjoy the full protection of the Clause, his challenge to an indictment must be appealable before exposure to trial occurs. For these reasons, the circuit court held that it had jurisdiction to hear Rep. Myers' Speech or Debate Clause claims. The court further held that the reasoning in *Helstoski* also permitted—if not required—the circuit court to provide pretrial review of Rep. Myers' challenges to the indictment based on the separation of powers doctrine. Said the court:

> Though this doctrine does not provide as precise a protection as the Speech or Debate Clause, there are equivalent reasons for vindicating in advance of trial whatever protection it affords as a defense to prosecution on criminal charges. If, because of the separation of powers, a particular prosecution of a Member of Congress is constitutionally prohibited, the policies underlying that doctrine require that the Congressman be shielded from standing trial. Like the Speech or Debate Clause, the doctrine of separation of powers serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen. [635 F.2d at 935–936]

After noting that little would be lost in the way of judicial efficiency if pre-trial appeals by indicted Members of Congress were to include all legal defenses, the court found that it also had jurisdiction to decide Rep. Myers' claims regarding the applicability and constitutionality of 18 U.S.C. § 201.

The circuit court then turned to the merits. The court rejected Rep. Myers' claim that the grand jury improperly considered information protected by the Speech or Debate Clause. In this regard, the court stated:

> Appellant's . . . claim is that the indictment should be dismissed because the grand jury that returned it heard some evidence of legislative acts that is privileged by the Speech or Debate Clause. Normally, an indictment is not subject to dismissal on the ground that there was "inadequate or incompetent" evidence before the grand jury. *Costello v. United States,* 350 U.S. 359, 362 (1956). This rule has been specifically applied to reject a claim that a grand jury heard some evidence protected by the Speech or Debate Clause. *United States v. Johnson,* 419 F.2d 56 (4th Cir. 1969), *cert. denied,* 397 U.S. 1010 (1970). See also *United States v. Helstoski,* 576 F.2d 511, 519 (3d Cir. 1978), *aff'd without consideration of this point, sub nom. Helstoski v. Meanor,* 442 U.S. 500 (1979); contra, *United States v. Helstoski,* Crim. No. 76–201 (D.N.J. Feb. 27, 1980) (unpublished). The procedural history of *Johnson* makes it especially instructive. Congressman Johnson's original conviction on both substantive and conspiracy counts was reversed by the Fourth Circuit, 337 F.2d 180 (1964). The Supreme Court agreed that retrial was necessary because a portion of the conspiracy count specifically charged con-

> duct protected by the Speech or Debate Clause. 383 U.S. at 176–77.
>
> However, the Supreme Court remanded for a new trial on the original indictment, requiring only deletion of that portion of the indictment charging protected conduct. [*Id.* at 185] Though the grand jury that had returned the indictment obviously had heard evidence of the protected conduct, which it had specifically alleged to be part of the conspiracy, the Supreme Court raised no objection to retrial on the redacted indictment. On appeal from Johnson's second conviction, the Fourth Circuit considered and rejected his challenge to the grand jury's receipt of privileged evidence. 419 F.2d at 58. We agree with the conclusion reached by the Fourth Circuit, which appears to be the implicit conclusion of the Supreme Court as well.[10]
>
> [10] We need not consider whether an indictment might be subject to a motion to dismiss in the event that the privileged evidence constituted such a large proportion of the evidence before the grand jury as to raise a substantial question of whether the grand jury had sufficient competent evidence to establish probable cause. In this case Judge Mishler noted at the argument on defendant's motion to dismiss that extensive tapes and recordings were before the grand jury, referring to the episodes in which, money was received allegedly in return for corrupt promises. (Tr. July 11, 1980 hearing 37).
>
> [*Id.* at 941]

Regarding Rep. Myers' claim that the indictment failed to state an offense, the court stated that it was irrelevant that no official act could be performed for a non-existent person:

> The offense described by § 201 is complete upon a Congressman's corrupt acceptance of money in return for his promise to perform any official act. The elements of the offense are the receipt of money, the making of the promise and the corrupt purpose with which these things are done. *United States v. Brewster, supra,* 408 U.S. at 526–27. The promise does not cease to relate to an official act simply because the undercover agent offering the bribe knows that the subject of the promised legislative action is fictitious and that the promise will not actually be performed. The statute condemns the Congressman's actions and state of mind. His alleged promise to introduce private immigration bills is a promise to perform "any official act." 18 U.S.C. § 201(c). [*Id.* at 940]

Rep. Myers' claim that section 201 was facially unconstitutional was likewise rejected by the circuit court:

> Appellant challenges the facial validity of 201 on the grounds that the statute conflicts with the Speech or Debate Clause and the doctrine of separation of powers. These claims are wholly without merit in light of *United States v. Brewster,* 408 U.S. 501 (1972) and *United States v. Johnson, supra.* Those decisions squarely uphold the constitutional authority of Congress to enact § 201, creating the offense of bribery, including bribery of a Member of Congress. The decisions recognize that the Speech or Debate Clause imposes significant limits on the prosecution of congressional bribery. Conduct that falls within the

> broad category of legislative action may not be charged as an offense under the statute, nor may evidence of a Member's legislative action be offered in evidence against him. *United States v. Brewster, supra,* 408 U.S. at 510; *United States v. Johnson, supra,* 383 U.S. at 184–85; *United States v. Helstoski,* 442 U.S. 477 (1979). But despite these limits, the facial validity of § 201 is clear. [*Id.* at 937]

Rep. Myers' argument that passage of section 201 violated the Punishment Clause was similarly dismissed. The court, which treated this argument as an attack on the constitutionality of section 201 as applied rather than on the section's constitutionality on its face, found that *Brewster* was dispositive of this challenge:

> The argument that acceptance of a bribe by a Member of Congress was peculiarly a matter appropriate for punishment exclusively by each House of the Congress was vigorously made in the dissenting opinions in *Brewster,* 408 U.S. at 541–44 (Brenann, J., dissenting); *id.* 551–52, 563 (White, J., dissenting). The arguments focused primarily on the Speech or Debate Clause, relying on the Behavior Clause to show that immunity from Executive Branch prosecution did not insulate Members of Congress who corrupt the legislative process from the sanctions of their peers. In declining to find in the Speech or Debate Clause an immunity from prosecution for corrupt promises to take legislative action, the majority in *Brewster* necessarily rejected any contention that Congressional punishment power in such matters was exclusive. [*Id.* at 937–938]

The court found equally unpersuasive Rep. Myers' argument that trial on this indictment would impermissibly force him to either introduce evidence of his legislative acts or forego his right to present a full defense. The court stated that although the Speech or Debate Clause prevents the Government from questioning a Member about his legislative acts, "It does not prevent a Member from offering such acts in his own defense, even though he thereby subjects himself to cross-examination." [*Id.* at 942]

The court also held that section 201 was not unconstitutional as applied in this case. Rep. Myers had argued that if Government agents are allowed to manufacture opportunities for Members to accept bribes, the Government would be free to entice into crime those Members whose political viewpoints differed from those of the Administration, contrary to the separation of powers doctrine. The court responded to this argument by noting, "Any Member of Congress approached by agents conducting a bribery sting operation can simply say 'No'." [*Id.* at 939] More important, should Congress decide that its Members were being subjected to targeting and harassment by the Exective branch, it could exempt its Members from the purview of the bribery laws. In this regard, the court stated:

> If the public policy concerns that have been identified warrant additional restrictions on the prosecution of Members of Congress for bribery, such restrictions are matters for consideration by those with public policy responsibil-

> ities, administrators in the Executive Branch and ultimately law-makers in the Legislative Branch. In *Brewster* the Supreme Court pointed out that if that decision underestimated "the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of Federal bribery laws." 408 U.S. at 524. By the same token, if the risks of a bribery sting operation outweigh its benefits, Congress always has the power to make the more limited modification of redefining the offense to exclude, in the case of Members of Congress or others, acceptance of bribes offered by undercover agents of the Government. With the policy choice thus fully within the control of Congress, we cannot conclude that the separation of powers doctrine creates a constitutional barrier to the law enforcement technique selected by the Executive Branch.[9]
>
> [9] Appellant also seeks to bolster his challenge to a bribery sting operation by contending that a prosecution founded on this technique presents a political question inappropriate for the Judicial Branch. This is simply another way of characterizing the public policy issues that are available for resolution by Congress.
>
> [*Id.* at 939]

Further, the court held that the legislative history of section 201 failed to show that Congress did not intend to allow the statute to be used when Government agents establish fictitious undercover operations that ensnare Members of Congress.

Regarding Rep. Myers' claim that the references to legislative acts in the indictment rendered the indictment invalid, the court stated that such references were made "for the entirely permissible purpose of detailing the nature of the corrupt promise allegedly made." [*Id.* at 937] This indictment, said the court, "contemplates no inquiry into the taking of any legislative action or the motivation for it." [*Id.*]

Rep. Myers' argument that the indictment presented a nonjusticiable political question was disposed of by the court in its discussion of the public policy issues inherent in deciding whether undercover agents should be allowed to entice Members of Congress to accept bribes. [See footnote 9, quoted above.]

On October 10, 1980, Rep. Myers filed a petition for writ of *certiorari* with the U.S. Supreme Court. [No. 80-527] The petition was denied on November 6, 1980. [449 U.S. 826]

On July 10, 1980 (the same day he filed his original motion to dismiss the indictment on a variety of grounds), Rep. Myers also filed a motion to dismiss on the grounds of prejudicial pre-indictment publicity and Government misconduct. Regarding publicity, he alleged that top officials of the Justice Department and the FBI, as well as members of the United States Attorney's Office and other members of the Government involved with ABSCAM, had publicly discussed such matters as: (1) the relative strength of the Government's case; (2) the character, motivation, and guilt of the defendant; (3) the rulings a judge should make on various legal issues, such as the entrapment defense; (4) the legality of the investigative procedures used; and (5) the proper interpretation of the videotapes. Rep. Myers relied on *Berger v. United States,* 295 U.S. 78 (1934) in arguing that this pretrial publicity would deny him his due process right to a fair trial, and that the indictment therefore should be dismissed. Regarding Government misconduct, Rep. Myers stated that the Government violated both Rule 6(e) of the Federal Rules of Criminal Procedure and Justice Department regulations (28 CFR § 50.2) by disclosing publicly matters occurring before the grand jury. These disclosures allegedly involved: (1) detailed descriptions of videotapes which were to be shown to the grand jury; (2) the dates when indictments were expected; and (3) the charges expected to be contained in the indictment. Rep. Myers further asserted that these actions by the Government may have well violated two Federal statutes: 5 U.S.C. § 552a[b] (the Privacy Act) and 18 U.S.C. § 1501 (obstruction of justice). He concluded by calling upon the court to demonstrate its intolerance of the Government's conduct by exercising its supervisory power to dismiss the indictment.

On August 7, 1980, Rep. Myers' motion to dismiss on the grounds of prejudicial pre-indictment publicity and Government misconduct was denied. In an opinion accompanying the order, Judge Mishler noted that the conduct of the Government officers who disclosed information of the investigation was "grossly improper and possibly illegal." [*United States v. Myers,* Cr. No. 80–00249 (E.D.N.Y.) Memorandum of Decision and Order, August 7, 1980, at 7] Nevertheless, Judge Mishler held that neither the Fifth Amendment nor any requirement that the judiciary oversee the proper administration of criminal justice mandated dismissal of the indictment. Turning to Rep. Myers' Fifth Amendment claim, Judge Mishler stated that he knew of no case in which an indictment had been dismissed upon the ground that the grand jury was prejudiced by pre-indictment publicity. Moreover, said Judge Mishler, in order to prevail on his Fifth Amendment argument, Rep. Myers would have to bear a heavy burden of demonstrating that he suffered *actual* prejudice as a result of the publicity. In so holding, Judge Mishler recognized that in *United States v. Sweig,* 316 F. Supp. 1148 (S.D.N.Y. 1970), *aff'd* 441 F.2d 114 (2d Cir. 1970). Judge Frankel suggested, in *dicta,* that Government generated pre-indictment publicity could warrant dismissal even without a showing of actual prejudice. Judge Mishler, however, held that because "other measures are available to deter and punish prosecutorial conduct, . . . it would be inappropriate to give the defendants a 'windfall' by dismissing the indictment simply because some unidentified and possibly low-level member of the prosecutor's office failed to adhere to his duty." [*Id.* at 13] In coming to this conclusion, Judge Mishler relied on *United States v. Stanford,* 589 F.2d 299 (7th Cir. 1978), *cert. denied,* 440 U.S. 983 (1979).

The court turned next to Rep. Myers' claim that the indictment should be dismissed pursuant to the court's supervisory power to discourage Government misconduct. Judge Mishler began by stating that courts undoubtedly have supervisory authority over the administration of justice, but that this authority must be invoked with extreme care. He called dismissal of an indictment an "extreme sanction" and stated that under *United States v. Fields,* 592 F.2d 638, 647 (2d Cir. 1978), *cert. denied,* 442 U.S. 917 (1979) dismissal is warranted only

> . . . to achieve one or both of two objectives: First, to eliminate prejudice to a defendant in a criminal prosecution; second, to help to translate the assurances of the United States Attorneys into consistent performances by their assistants.

As to the first situation described in *Fields,* Judge Mishler stated that Rep. Myers had failed to show actual prejudice. As to whether dismissal would "help to translate assurances by the United States Attorneys into consistent performances by their assistants," Judge Mishler held that it would not. He stated that the *Fields* court had been referring to situations such as those exemplified by *United States v. Estepa,* 471 F.2d 1132 (2d cir. 1972)—a case in which an indictment was dismissed because the prosecutor had failed to heed repeated warnings by the court not to use hearsay evidence before the grand jury. In the present case, said Judge Mishler, this pattern of constant disregard of court directives was absent. Further, the present case did not fall within the ambit of *Fields* because here the Attorney General, by instituting an investigation of the disclosures and publicly promising to deal severely with the guilty employees, would provide any necessary deterrence against future Government misconduct.

Also on July 10, 1980, Rep. Myers moved to dismiss the indictment on the ground that the manner in which the Government conceived of and conducted its investigation was so outrageous and offensive as to constitute a violation of Rep. Myers' due process rights. In support of this charge of Government overreaching, Rep. Myers charged that ABSCAM involved gross improprieties and outright illegalities on the part of FBI agents and Department of Justice personnel. According to the defendant, the Government created a criminal enterprise known as Abdul Enterprises whose purpose was originally to uncover those dealing in contraband and stolen property, but which soon turned to luring political targets into a carefully orchestrated scheme of deceit and bribery. These political targets, moreover, were not chosen because of any suspicion that they were involved in criminal activity. Nevertheless, they were enticed to attend meetings with Government undercover agents posing as representatives of an Arab sheik anxious to invest his wealth in legitimate business enterprises in the target's political locale. Once in attendance, the defendant contended, he was lied to and maneuvered into compromising positions through a carefully developed plan in which calculated questions led imperceptibly to illicit activity. Moreover, said Rep. Myers, the sordid scheme was made even more reprehensible by the very presence of Government attorneys at or near the sites of these meetings, who saw to it, through continuing surreptitious communication with the undercover operatives, that Federal jurisdiction was "manufactured."

The defendant also charged that in the course of its investigation the Government, in order to protect its undercover operation, violated numerous state and Federal laws, as well as the internal regulations and policies of the FBI and the Department of Justice. For example, it was alleged that Government agents filed false affidavits with a Federal court; allowed one of their undercover operatives to use Abdul Enterprises in order to swindle numerous businessmen; illegally established a front organization and filed false statements with Federal agencies; introduced misrepresentations into the banking system by creating a bogus account; and obtained a lease on a townhouse in Washington, D.C. by resorting to false pretenses. The defendant concluded that these systematic abuses by law enforcement authorities, culminating in the instant indictment, were unprecedented in scale. The only way to maintain the integrity of the judicial process, concluded Rep. Myers, would be to dismiss the instant indictment.

On August 7, 1980, Judge Mishler filed a memorandum and order addressing Rep. Myers' claims of Government overreaching. The Judge began by pointing out that Rep. Myers was not raising an entrapment defense. He also noted that Federal courts do have the power to preclude a criminal prosecution because of Government misconduct. The court would entertain Rep. Myers' motion, said the Judge, but not before trial as he had requested. Because the defendant was challenging almost every facet of the investigation, the court concluded that a pre-trial hearing would unduly delay the trial. Further, said Judge Mishler, the publicity that would undoubtedly surround such a pre-trial hearing would make it difficult to select an unbiased jury. Accordingly, the court reserved ruling on Rep. Myer's motion until the conclusion of the Government's case at which point hearings on the matter would be conducted if necessary.

On August 8, 1980, the case was transferred from Judge Mishler to Judge George Pratt.

On August 11, 1980, Rep. Myers' trial began. On August 29, 1980, Rep. Myers was found guilty on all three counts (as were the other defendants).

Hearings on Rep. Myers' motion to dismiss on the grounds of Government overreaching began on January 12, 1981. These "due process" hearings concluded on February 16, 1981.

On March 24, 1981, Rep. Myers filed a memorandum in support of his motion to dismiss on the ground of overreaching. In this memorandum, he also alleged that he had been entrapped. On May 1, 1981 the Government filed a memorandum in response.

On July 24, 1981, Judge Pratt issued an order and memorandum in which Rep. Meyers' motion to dismiss was denied. In his 136 page memorandum Judge Pratt began his discussion of the *Myers* case by outlining the claims Rep. Myers had made in his post-trial motion:

> The four defendants in *Myers* have filed joint briefs in support of all post-trial motions and thus their arguments are referred to collectively. The *Myers* defendants essentially claim that the Abscam investigation did not uncover criminal conduct, but instead created or instigated any criminality that may be present, and that improper delegation of authority, lack of supervision, inadequate documentation and the reward system used by the government created such doubt as to the truth, reliability and integrity of the verdict as to require dismissal of the indictments. The *Myers* defendants urge, in effect, that notwithstanding

> their failure to claim entrapment at the trial, they are not precluded from now asserting a defense of "entrapment as a matter of law", or "objective entrapment." They urge that many states have recognized and legislatively adopted objective entrapment and that the federal courts should constitutionalize that trend.
>
> More particularly, the *Myers* defendants argue that the government did not infiltrate or uncover ongoing criminal activity, but instead created such activity; that the government offered overwhelming inducements to the *Myers* defendants; that Abscam was conducted without adequate safeguards, particularly with respect to supervision of Weinberg; that the techniques employed by the government in Abscam were "outrageous" within the meaning of *Hampton v. United States,* 425 U.S. 484 (1976); that there was entrapment as a matter of law; that the compensation of Weinberg as an informant is unconstitutional; that it is improper to undertake a general investigation into the corruptibility of members of a particular branch of government without some "well-grounded basis"; that as a matter of constitutional law the "so-called due process defense or objective strand of the entrapment defense" should be available to a defendant subjected to "outrageous governmental investigatory action"; that the destruction, erasure or unexplained loss of tapes requires an inference that the tapes contained exculpatory material; and that in an undercover investigation the verbal assertion by a potential target that he or she desires to act within the law forecloses any further investigation of that individual. [Memorandum and Order, July 24, 1981, at 31-32]

Next, Judge Pratt outlined the Government's response [8] to Rep. Myers' arguments:

> The government argues that the ABSCAM investigation in its totality was both appropriate and constitutional, that the rights of none of the defendants were violated by the investigation and that there was no exculpatory evidence withheld from the defense. In the government's view, all of the defendants' "due process" contentions basically fall into two categories, neither of which has validity: governmental "over-involvement" in the creation of criminal activity, and the government's failure to take measures to ensure that innocent people would not be wrongfully ensnared and convicted. The government urges that defendants' claims

---

[8] Judge Pratt's July 24th order and memorandum was dispositive not only of Rep. Myers' due process claims, but also of the claims of Reps. Lederer, Thompson, and Murphy who raised similar due process issues during their ABSCAM prosecutions. As a result, the Government's response addressed the claims not only of Rep. Myers, but also of Reps. Lederer, Thompson, and Murphy. Further, whenever in Judge Pratt's memorandum reference is made to the "defendants" it should be understood that the court is referring not only to Rep. Myers and those indicted with him, but also to all the defendants in the *Lederer, Murphy,* and *Thompson* ABSCAM cases.

> "cannot be considered in the abstract, for the facts as developed at the trials reveals [sic] a collection of unscrupulous public officials who were never "victimized" by the informant or the intermediaries and whose guilt was clear because they were clearly guilty, not because they had been manipulated to appear in compromising positions before the cameras."—Government's memorandum at 1.
>
> The government further argues that the Abscam investigation was pursued in good faith and conducted professionally in view of the circumstances, that no right of any defendant was infringed and, finally, that whether an operation such as Abscam is "good" or "bad" is a matter to be decided initially by the executive branch of our government, subject to legislation by Congress, but does not present judicial questions under the due process clause. [*Id.* at 35–36]

The court then proceeded to group the defendant's challenges into two categories: general and specific. The court found that there were six general challenges, the first of which was that "the indictment should be dismissed because the Abscam investigation did not uncover criminal conduct, but instead created and instigated it." [*Id.* at 49] Before addressing the merits of this contention, Judge Pratt discussed at length the law of entrapment:

> Much of the judicial discussion of these questions has focused on the ideas generally encompassed in the concept "entrapment". Although virtually all judges have agreed that an innocent person who was "entrapped" by government agents into committing a criminal act should not be convicted, there is less agreement on the proper principles underlying the concept of entrapment and on what factors do or do not constitute entrapment.
>
> Under the so-called "subjective" approach to the defense of entrapment, two factors must be considered: Was the defendant's criminal conduct "induced" by the government agent? If it was, was the defendant "predisposed" to commit the crime? This subjective approach focuses upon the conduct and propensities of the particular defendant in each case. It is for the jury to determine, first, whether there is sufficient evidence of "inducement' and, if so, whether the government has proven beyond a reasonable doubt that the defendant was "predisposed". In theory, the subjective approach to entrapment is grounded in legislative intent: if an otherwise innocent person was entrapped by a government agent into performing a criminal act, the legislature never intended that his conduct be punished. *Sorrells v. U.S.,* 287 U.S. 435 (1932); *U.S. v. Russell,* 411 U.S. 423 (1973).
>
> "Objective" entrapment is a term applied to either of two different concepts. Under one view of "objective" entrapment the focus is not upon the propensities and predispositions of the individual defendant, but instead upon an objective standard of "persons who would normally avoid crime and through self-struggle resist ordinary tempta-

tions", *Sherman v. U.S.,* 356 U.S. 369, 384 (Frankfurter, J., concurring), in order to determine whether the inducement tendered by the government agent was unacceptable.

The second view of "objective" entrapment focuses upon the conduct of the government agents in each particular case to determine whether that conduct "falls below standards, to which common feelings respond, for the proper use of governmental power". *U.S. v. Russell,* 411 U.S. at 441, (Steward, J., dissenting). However, and despite eloquent arguments in several dissenting and concurring opinions, *Sorrells,* 287 U.S. 435; *Sherman,* 356 U.S. 369; *Russell,* 411 U.S.; and *Hampton,* 425 U.S. 486, the "objective" approach to entrapment has never been accepted by any majority of the Supreme Court.

Some confusion has arisen because "objective" entrapment, the view that over-involvement of the government in the commission of a crime requires dismissal of an indictment, has also been called "entrapment as a matter of law". Further semantic confusion has arisen, however, because the term "entrapment as a matter of law" has also been applied to a situation where, on the evidence presented, no jury could find beyond a reasonable doubt, that the defendant was predisposed to commit the crime that was induced by the government agents. *Sherman v. U.S.* 356 U.S. 369; see *U.S. v. Jannotti,* 501 F. Supp. at 1200. Under that view, "entrapment as a matter of law" simply means that insufficient evidence was presented to warrant the case going to the jury on the issue of defendant's predisposed state of mind.

Entrapment is a difficult, conceptually slippery, and philosphically controversial concept. Ever since *Sorrells v. U.S.,* 287 U.S. 435 (1932), the Supreme Court has divided sharply on the standards to be applied in reviewing the conviction of a person whose criminal conduct was in part facilitated by government agents. In *U.S. v. Russell,* 411 U.S. 423 (1973), a Supreme Court majority of five claimed to adhere to *Sorrells* as a precedent of long standing that had already once been reexamined and implicitly reaffirmed in *Sherman v. U.S.,* 356 U.S. 369 (1958). Writing for the court in *Russell,* Justice Rehnquist pointed out that "since the entrapment defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." 411 U.S. at 433 (footnote omitted).

Four Supreme Court decisions are central to the issue of entrapment. *Sorrells,* 287 U.S. 435; *Sherman,* 356 U.S. 369; *Russell,* 411 U.S. 423; and *Hampton,* 425 U.S. 484. Familiarity with the majority, concurring, and dissenting opinions in those decisions is assumed. From those decisions as a whole it appears that the "objective" view of entrapment as espoused by Justice Brennan in *Hampton* has never been accepted by a majority of the Supreme Court. The "subjective" view has been adopted in *Sorrells, Sherman,* and *Russell* and appears to be still acceptable to a present majority of the current Supreme Court bench, at least in most cases, where a defendant's predisposition has been established.

Hampton presents a more complex picture. There, three justices voted to solidify the subjective approach so that under no circumstances, regardless of how egregious the governmental conduct, could a defendant who was found by a jury to have been predisposed to commit the crime have the indictment dismissed for governmental misconduct. 425 U.S. 484. Three other justices believed that the circumstances showed that governmental officials had purposefully created the crime in *Hampton* and that such creative activity by governmental officials required dismissal despite defendant's predisposition to commit the crime. 425 U.S. at 495 (Brennan, J. dissenting). Two other justices in an opinion written by Justice Powell found that *Hampton* was controlled by *Russell,* that Hampton had not even raised the issue of predisposition, and that his entrapment defense, therefore, failed for lack of proof. 425 U.S. at 490 (Powell, J., concurring). Justice Powell declined, however, to close the door entirely upon the possibility of court intervention in an extreme case. He refused to accept the premise "that, no matter what the circumstances, neither due process principles nor [the Supreme Court's] supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition." 425 U.S. at 495. In footnote, Justice Powell added:

> I emphasize that the cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses which are so difficult to detect in the absence of undercover Government involvement. One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic * * * which is one of the major contributing causes of escalating crime in our cities. * * * Enforcement officials, therefore, must be allowed flexibility adequate to counter effectively such criminal activity.
>
> 425 U.S. at 496 n. 7 (citations omitted).

Thus as the Court divided in *Hampton,* with Justice Stevens taking no part: three judges would make predisposition the only issue; three judges would eliminate predisposition entirely; and the decisive two concurring votes, expressed in Justice Powell's opinion, indicate that predisposition is not only relevant but will be dispositive in all but the "rare" case where police over-involvement in the crime reaches "a demonstrable level of outrageousness". Since Hampton had been predisposed, and since the police

> involvement in his crime was not "outrageous", his conviction was affirmed. The three dissenting judges would eliminate consideration of predisposition entirely and would instead devote their attention only to governmental misconduct. While they would prefer to be more restrictive of permissible governmental involvement in crime than Justice Powell's test of "outrageousness", the dissenters' position *a fortiori* accepts the "outrageousness" standard, making it the point in the continuum of escalating police involvement in crime where five members of the present court agree that a conviction should be overturned and an indictment dismissed.
>
> Until further word from the Supreme Court, therefore, as a matter of strict legal precedent, this court must assume that while the subjective view of entrapment is the general guide, it is nevertheless subject to an overriding exception that under either the court's supervisory power or the due process clause, a predisposed defendant cannot be convicted if police over-involvement in his crime reaches "a demonstrable level of outrageousness". *See U.S. v. Johnson,* 565 F.2d 179, 181 (CA 1 1977) [*Id.* at. 37–42 (footnotes omitted)]

Having reviewed the law of entrapment, Judge Pratt found that the argument that prosecution must be barred whenever a Government agent provided the impetus for a crime, "simply does not represent the law as established by the United States Supreme Court." [*Id.* at 50] Thus, since the concept of "objective entrapment" had never been recognized by the Supreme Court, Rep. Myers' entrapment claim was "restricted to principles of subjective entrapment, where the creative activity of the government entraps into criminal conduct a defendant who was not predisposed to commit the crime." [*Id.*] However, said the court, the issue of predisposition is generally a question of fact to be determined by a jury. In the instant case, the court continued, Rep. Myers had not requested a jury charge on the question of entrapment. Thus, the issue of subjective entrapment could not now be raised before the court.

The second general challenge raised by Rep. Myers was that even if he had not been entrapped, the indictment should be dismissed because the Government's handling of the investigation was so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction. After noting that the defendant's argument was based on the opinions of Justice Rehnquist in *Russell* and *Hampton,* the court disposed of this challenge by stating:

> It is important to recognize, however, that in neither *Russell* nor *Hampton* was the questioned governmental conduct held to be "outrageous". Nor has any other decision of the Supreme Court found law enforcement officers' conduct to be so "outrageous" as to require dismissal of an indictment. Thus, even though the Supreme Court has yet to be confronted with or to offer a description of circumstances sufficiently outrageous to warrant dismissal, the governing principle remains that in some case, under some

> circumstances, the conduct of law enforcement officials may some day bar prosecution. [Rep. Meyers argues] that those cases, those circumstances and that conduct have arrived with Abscam.
>
> It is clear that mere instigation of the crime does not render law enforcement activity "outrageous". Here, the government presented a fictitious sheik, seeking to buy favorable legislative action. Undercover agents offered money in return for defendant legislators' promises to introduce a private immigration bill. In simple terms, bribes were offered by the undercover agents and accepted by the defendant congressmen.
>
> Clearly, the government agents created the opportunity for criminal conduct by offering the bribes. But their involvement falls far short of being "outrageous" for two reasons. In the first place, each of the legislators could simply have said "no" to the offer. *U.S. v. Myers,* 635 F.2d at 939. *Three* other legislators faced with identical offers, Senator Pressler, Congressman Patten and Congressman Murtha did precisely that as shown by the videotapes in evidence as DP Exs. 22, 21, and *Thompson* trial Ex. 29. Second, the extent of governmental involvement here is far less than that in *Hampton,* where the government not only supplied heroin for the defendant to sell, but also produced an undercover agent to buy it from him. Even under those circumstances, where the government was active on both sides of a narcotics sale, the Supreme Court did not consider the agent's conduct to be "outrageous"; *a fortiori* here, where the agents acted only on one side, by offering money to congressmen in return for favors, the involvement of the undercover agents was not "outrageous". [*Id.* at 52–54 (footnotes omitted)]

Rep. Myers' third general challenge was that "to permit targets to be selected by middlemen violated due process because it did not provide sufficient protection to the innocent." [*Id.* at 54] This argument, said the court, was both legally and factually unsupportable. It was legally infirm, said the court, because "the Constitution does not require reasonable suspicion before a congressman may be made the subject of an undercover sting. *U.S. v. Myers,* 635 F.2d at 940–941. See also *U.S. v. Ordner,* 544 F.2d 24 (CA2 1977)." [*Id.* at 54–55] The argument was factually infirm because "the agents did not set out to offer bribes to any particular congressman. They set no standards, established no criteria." [*Id.*]

Rep. Myers' fourth general argument was that "the inducements offered to the congressmen were overwhelming, designed to overpower their otherwise adequate resistance and to induce honest and innocent people to commit a crime they would normally avoid." [*Id.* at 57 (footnote omitted)] Judge Pratt rejected this argument, stating that the size of the inducement was irrelevant:

> While there may be "inducements" that are "overwhelming", such as a threat against the life of a loved one, when the inducement is nothing but money or other personal gain, this court does not believe that the size of the

> inducement should be a determinative factor in whether a public official can be prosecuted for accepting it. No matter how much money is offered to a government official as a bribe or gratuity, he should be punished if he accepts. It may be true, as has been suggested to the court, that "every man has his price"; but when that price is money only, the public official should be required to pay the penalty when he gets caught. In short, as a matter of law, the amount of the financial inducements here could not render the agents' conduct outrageous or unconstitutional. [*Id.* at 59]

Rep. Myers' fifth argument was that there was no need for the Government to establish a wholly fictitious operation to ferret out public corruption. The court readily dismissed this argument, stating:

> This court believes that the great majority of government officials, including those in Congress, are honest, hard-working, dedicated and sincere. However, the government needs to have available the weapons of undercover operations, infiltration of bribery schemes, and "sting" operations such as Abscam in order to expose those officials who are corrupt, to deter others who might be tempted to be corrupt, and perhaps most importantly, to praise by negative example those who are honest and square-dealing. Without the availability of such tactics, only rarely would the government be able to expose and prosecute bribery and other forms of political corruption. [*Id.* at 63-64]

Turning to the last of Rep. Myers' general challenges—that the convictions were not a reliable measure of his culpability—the court stated that because the essence of the Government's case consisted of videotapes, "A more reliable basis for conviction can hardly be imagined." [*Id.* at 64]

Next, the court considered a number of specific challenges to the operation of ABSCAM. Rep. Myers' first argument was that ABSCAM was conducted without adequate safeguards, particularly with respect to the supervision of Mr. Weinberg. The problem with the argument, however, said the court, was that Rep. Myers had failed to show "any direct or specific harm resulting from the alleged lack of supervision." [*Id.* at 66] Moreover, the supervision of Mr. Weinberg, according to the court, was in fact "more than adequate to the circumstances of this investigation." [*Id.*] In this regard, the court stated:

> In an investigation that spanned many months and meetings all along the coast, Weinberg was in virtually daily contact with Amoroso, and his recordings were delivered to the FBI for transcribing on a periodic basis. Most importantly, the key events on which the government relied in presenting its cases, the appearances before the videotape cameras, took place in the presence of the FBI agents, and occasionally under the direct supervision of an attorney from the Eastern District Strike Force. Beyond that, super-

> vising agent Good and strike force chief Puccio continually monitored the progress of the investigation, and each reported regularly to their respective superiors in the bureau and the Department of Justice. [*Id.* at 67-68]

Next, Judge Pratt addressed Rep. Myers' contention that he was prejudiced at trial by the fact that many of the audiotapes made by Mr. Weinberg either contained gaps or were missing. Allegedly, exculpatory conversations were not recorded at all. The court disposed of these arguments by finding that no evidence had been introduced to support the assertion that the unrecorded or missing conversations were important.

The court described Rep. Myers' third specific argument as follows: "The *Myers'* defendants argue that when a potential target in an undercover investigation merely states that he desires to act within the law, the government should be automatically foreclosed from any further investigation of him." [*Id.* at 70] The court found, however, that if Rep. Myers' argument were adopted, "all the subject would have to do would be to invoke the magic incantation 'I desire to act within the law' and then plunge into his nefarious activities, confident that thereafter any statements or conduct by him would be immune from investigation." [*Id.* at 70-71]

Rep. Myers' fourth specific argument was that dismissal of the indictment was required because during the investigation Government officials violated numerous laws, regulations, and guidelines. Like its predecessors, this argument was rejected by the court. "It is clear", said Judge Pratt, "that for a court to dismiss an indictment there must be not only a constitutional violation, but also some resulting adverse effect or prejudice to the defendant." [*Id.* at 71-72 (citation omitted)] In the instant case, concluded Judge Pratt, Rep. Myers had shown neither a constitutional violation nor any resulting prejudice.

Another argument raised by Rep. Myers was that the Government's use of middlemen such as Messrs. Criden, Errichetti, and Silvestri was an irresponsible attempt to insulate the Government from its responsibility to conduct a fair investigation. In effect, said Rep. Myers, the Government had used these middlemen as its agents and was now responsible for the machinations of those middlemen. In discussing this assertion, Judge Pratt termed it "ludicrous." In the court's view, the Government's use of middlemen "was no more improper than an undercover agent's infiltration of a drug ring in order to gain the confidence of its members and obtain evidence necessary for conviction. *U.S. v. Russell,* 411 U.S. at 432." [*Id.* at 83]

The last major due process challenge concerned the conduct of Mr. Weinberg. It was the defendant's belief that "the government knew that Weinberg was untrustworthy and that defendant's due process rights were violated when the government permitted such a person to play a major role in Abscam." [*Id.* at 93] Judge Pratt addressed this contention by conceding that Mr. Weinberg had an "unsavory background." [*Id.* at 94] But it was precisely because of this background, said Judge Pratt, that Mr. Weinberg was so valuable:

> [Mr. Weinberg's] ability to lie convincingly, his understanding of the corrupt mind and his ability to imagine and execute a grand charade on the scale of Abscam [was the reason] that Weinberg was enlisted for the investigation. Further, Weinberg gave considerable credibility to the entire undercover operation; persons dealing with Weinberg in the context of Abscam could check him out with other sources and be wrongly assured that they were not dealing with government agents. Weinberg had a track record that no legitimate government agent could provide or falsify.
>
> Moreover, the government was not required to find Weinberg "reliable", as would be the case if he were an informant whose information was used to obtain a search warrant . . . [T]he basic reliability for the investigation, and ultimately for the prosecutions, was guaranteed by having the crimes committed on camera under circumstances guided by Agent Amoroso and closely supervised by Agent Good. [*Id.*]

With respect to the defendant's additional argument—that Mr. Weinberg had been given an exorbitant salary by the Government, and that he was promised a bonus for each conviction—Judge Pratt found that in point of fact Mr. Weinberg's remuneration was neither exorbitant nor contingent in any way upon convictions.

In addressing the alleged contingent fee agreement, Judge Pratt said:

> Here the court finds that Weinberg's payments in Abscam have not been contingent. Even if they were, however, that would be but one more fact to be weighed in determining the reliability of the results obtained. Payments to informants contingent upon successful prosecution of those with whom they deal have been judicially criticized, but such payments do not require dismissal of an indictment. *See, e.g., U.S. v. Brown,* 602 F.2d 1073 (CA2 1979); *U.S. v. Szycher,* 585 F.2d 443 (CA10 1978). [*Id.* at 96]

In addressing the amount of Mr. Weinberg's salary, Judge Pratt said:

> Whether his contribution to law enforcement in these cases and the personal sacrifices [Mr. Weinberg] has endured, during both the investigation and the prosecutions, are worth the amount of money the government has conferred upon him, is perhaps a matter for serious consideration by the Justice Department and even by Congress. It is not, however, a matter upon which this court will pass judgment for purposes of determining whether the fruits of his activities on behalf of the government should be dismissed. How much money is paid to a government informant is peculiarly a decision for the executive department, and not one for judicial review at the behest of a defendant who was caught by the informant's activities. [*Id.* at 97]

Judge Pratt concluded his memorandum by addressing—and rejecting—a number of arguments Rep. Myers had made in support of motions he had made for a new trial and for a judgment of acquittal.

On August 13, 1981, Rep. Myers was sentenced to 3 years imprisonment for each of the 3 counts on which he was found guilty. The sentences, however, were to be run concurrently. In addition, Rep. Myers was fined $10,000 for his conviction under Count I and $10,000 for his conviction under Count II, for a total of $20,000. Execution of the prison sentence was stayed pending Rep. Myers' appeal.

On August 24, 1981, Rep. Myers filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit. [No. 81-1342]

On appeal, Rep. Myers argued, *inter alia*, that:

> The indictment and prosecution of Congressman Myers violated his immunity under the Speech or Debate Clause. Moreover, the criminal investigation of a Member of Congress as part of the Executive's sting operation without a probable cause basis violated the separation of powers doctrine which underpins that immunity. [Brief on Behalf of Defendants—Appellants Michael Myers, Angelo Errichetti, and Louis Johanson, January 5, 1982, at iii-iv]

And that:

> The tactics utilized by the Government as part of its Abscam investigation were destructive of defendants due process rights. The tactics violated constitutional protections designed to insulate citizens from governmental overreaching and creation of crime and also rendered it impossible to fairly determine in the context of a criminal prosecution whether defendants committed the crimes alleged in the indictment.[*Id.* at iv]

The arguments raised in support of these contentions were identical to those raised before the district court.

The Government, in turn, filed its brief on February 16, 1982. Once again, it repeated the arguments that prevailed before the district court.

On March 9, 1982, Rep. Myers filed a motion for a new trial. The motion was based largely on an affidavit by Mr. Weinberg's wife, Marie Weinberg. The affidavit, signed by Mrs. Weinberg shortly before her death in 1982, alleged that certain individuals, described by Mr. Weinberg to Mrs. Weinberg only as "friends," gave Mr. Weinberg a number of "gifts," including three televisions sets and a stereo system. Further, Mrs. Weinberg stated that Mr. Weinberg "gave" several of their personal possessions, including their dining and living room furniture to various named FBI agents. Also, Rep. Myers filed an affidavit by news reporter Indy Badhwar who apparently had interviewed Mrs. Weinberg and been told by her that Mr. Weinberg had received gifts from Mr. Errichetti. Because during cross-examination Mr. Weinberg had denied receiving any gifts from Mr. Errichetti, the Weinberg and Badhwar affidavits cast considerable doubt on the credibility of Mr. Weinberg's trial testimony, said Rep. Myers, and accordingly a new trial or at least the reopening of the due process hearings should be ordered.

On March 24, 1982, Judge Pratt filed a memorandum and order denying Rep. Myers' motion for a new trial and his motion to reopen. [*United States* v. *Myers,* 543 F. Sup. 753 (E.D.N.Y. 1982).] According to the judge, the evidence that FBI agents and Mr. Weinberg may have exchanged gifts provided "no basis" for granting a new trial or reopening the due process hearings since Rep. Myers had failed to show how such improper dealings may have affected his rights. With respect to the gifts by Mr. Errichetti to Mr. Weinberg and the issue of Mr. Weinberg's credibility, Judge Pratt ruled that the Weinberg and Badhwar affidavits "would not inject reasonable doubt into what was otherwise an overwhelming case" against Rep. Myers. [534 F. Supp. at 757] With respect to the motion to reopen, Judge Pratt similarly held that the additional evidence offered by Rep. Myers would not produce a different verdict.

On April 5, 1982, the August 24, 1981 appeal was argued before circuit judges Lombard, Friendly, and Newman.

Status—The case is pending in the U.S. Court of Appeals for the Second Circuit.

The complete text of the August 8, 1980 opinion of the circuit court is printed in the "Decisions" section of *Court Actions and Proceedings of Vital Interest to the Congress,* September 1, 1981.

The complete text of the July 24, 1981 opinion of the district court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* September 1, 1981.

The complete text of the March 24, 1982 opinion of the district court is printed in the "Decisions" section of this report at page 678.

United States v. Kelly

No. 82-1660 (D.C. Cir.)

On July 15, 1980, U.S. Representative Richard Kelly of Florida was indicted by a Federal grand jury in the District of Columbia. Indicted with Rep. Kelly were Gino Ciuzio, a private citizen living in Florida, and Stanley Weisz, a private citizen living in New York. [Criminal Case No. 80-00340 (D.D.C.)]

Count I of the five count indictment charged the defendants with conspiracy,[1] contrary to 18 U.S.C. § 371.[2] It was alleged that between November 1979 and February 1980 the defendants agreed that Rep. Kelly would use his power and influence as a Member of the U.S. House of Representatives to provide immigration assistance to foreign businessmen. Purportedly acting as agents for the foreign businessmen were "Tony DeVito" and Melvin Weinberg. In actuality, however, DeVito was Anthony Amoroso, Jr., a Special

---

[1] Specifically, conspiracy to violate 18 U.S.C. § 201(c) (bribery).

[2] 18 U.S.C. § 371 provides: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment of such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Agent of the Federal Bureau of Investigation ("FBI"), and Mr. Weinberg was a private citizen assisting the FBI.

According to Count I, it was agreed that in return for Rep. Kelly's assistance, Mr. Weinberg and DeVito would pay him $250,000. It was further charged that on January 8, 1980 Rep. Kelly received $25,000 from Mr. Weinberg and DeVito as an initial payment. According to the terms of the conspiracy, said Count I, Rep. Kelly would keep $100,000 of the $250,000 sum, with Mr. Ciuzio, Mr. Weisz, and unindicted co-conspirator William Rosenberg sharing the other $150,000 equally.

Count II charged that by soliciting and receiving a sum of money in return for his promise to provide immigration assistance to the foreign businessmen, Rep. Kelly committed bribery, contrary to 18 U.S.C. § 201(c).[3] Count II further charged Mr. Ciuzio and Mr. Weisz with aiding and abetting Rep. Kelly to commit bribery. Accordingly they were charged with criminal liability as principals, pursuant to 18 U.S.C. § 2.[4]

Count IV charged that on January 8, 1980, Rep. Kelly traveled interstate (from Florida to Washington, D.C.) with intent to promote unlawful activity, to wit, bribery. Such travel was said to violate 18 U.S.C. § 1952 (Travel Act).[5]

Counts III and V did not involve Rep. Kelly.

On July 25, 1980, defendant Kelly entered a plea of not guilty to all counts (i.e. Counts I, II and IV). The same day, the Government filed a motion for a protective order, claiming that Rep. Kelly had repeatedly made public statements as to his intention to release publicly all audio and video tapes and transcripts of his alleged crimes. (These materials, which the Government held as evidence, would be received by Rep. Kelly pursuant to the rules of discovery applicable to criminal cases.) The public disclosure of such materials, argued the Government, would impair the court's ability to empanel a fair and impartial jury and would possibly violate the rights of individuals whose voices and images appeared on the tapes. Accordingly, the Government asked the court to issue a protective order prohibiting the defendant from disclosing publicly any materials obtained through discovery.

---

[3] 18 U.S.C. § 201(c) provides: Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

[4] 18 U.S.C. § 2 provides: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principle.

[5] 18 U.S.C. § 1952 provides, in pertinent part: (a) whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

In response to the Government's motion, Rep. Kelly argued that the Government had been disclosing information about the case to the public on a selective basis. He claimed that his constituents would be unable to exercise their constitutional rights to vote properly and intelligently in the upcoming election if the only information about the case given to them was to be the selective and prejudicial information disclosed by the Government. Unpersuaded by Rep. Kelly's arguments, the court, Chief Judge William B. Bryant presiding, granted the Government's motion for a protective order on August 15, 1980.

On September 4, 1980, Rep. Kelly filed a motion to dismiss the indictment due to selective prosecution. In the alternative, Rep. Kelly asked that an evidentiary hearing be provided to determine whether selective prosecution occurred. In support of the motion, he asserted that only one other Member of Congress voted against the President's legislative proposals more often than he did. Rep. Kelly further asserted that he was "extremely unkind" to members of the Carter Administration who appeared before his committee to testify. The defendant also alleged that in a conversation on February 2, 1980 at the Brooklyn office of the Organized Crime Strike Force, a member of the Strike Force inquired of Philip Heymann, Assistant U.S. Attorney General for the Criminal Division, "Did we get Kelly?" To which Mr. Heymann allegedly replied, "Yes, we got the troublemaker, Kelly." The defendant next claimed that various newspaper accounts indicated that the Government had information concerning other political figures that was "equally as valid" as the information in the Government's possession regarding the defendant. By targeting him for investigation and prosecution, and by disregarding potentially incriminating evidence against supporters of the Administration, the Government, said Rep. Kelly, violated his Fifth Amendment right to the equal protection of the laws. At the least, argued Rep. Kelly, an evidentiary hearing should be held to explore the matter.

On October 29, 1980, the Government's response to the motion was filed and placed under seal.

On November 21, 1980, the defendant's motion was denied. In a short memorandum accompanying its order, the court stated that Rep. Kelly had failed to make even a colorable showing that he was prosecuted because of his political views or that he was singled out for prosecution.

On September 5, 1980, defendant Kelly had also moved to dismiss the indictment on the basis of Government disclosures and prejudicial publicity. In the alternative, Rep. Kelly asked that an evidentiary hearing on the matter be provided. In his motion, Rep. Kelly argued that unwarranted disclosures of information to the press about the ABSCAM investigation denied him the right to an unbiased and impartial grand jury, and also served to deny him an opportunity for an unbiased petit jury and a fair trial. He alleged that these disclosures were in violation of the Privacy Act (5 U.S.C. § 522(a)[b]), 18 U.S.C. § 1503 (obstruction of justice); and Rule 6(e) of the Federal Rules of Criminal Procedure (grand jury secrecy).

In its October 30, 1980 response, the Government conceded that in February 1980 personnel within the Department of Justice were indeed responsible for serious leaks to the press concerning the ABSCAM investigation. The Government claimed however that most of the publicity generated by the leaks subsided by mid-February 1980 and that the press treatment of ABSCAM as a whole had been factual and non-accusatory. Moreover, said the Government, since February 1980 the defendant had taken every opportunity to discuss his case in public, thereby nullifying his right to complain about unauthorized Government disclosures. If the case was still alive in the minds of potential jurors, said the Government, it was because of Rep. Kelly's efforts, not those of the Government. The Government further argued that Rep. Kelly's claim that a fair trial would be impossible was speculative and premature. It was further alleged that an evidentiary hearing would serve no purpose since the Government had already admitted that the complained of disclosures were from Government sources.

On November 24, 1980, Rep. Kelly's motion to dismiss the indictment because of Government disclosures and prejudicial publicity was denied. No memorandum accompanied the court's order.

On September 15, 1980, Rep. Kelly had also moved to dismiss Count IV, stating that the Government manufactured the interstate travel alleged in the indictment. Specifically, he asserted that Government undercover agents called him to a meeting at a Washington, D.C. townhouse in order to ensure the presence of the interstate element necessary for a conviction under the Travel Act. In support of this motion, Rep. Kelly relied heavily upon the holding in *United States v. Archer,* 486 F.2d 670 (2d Cir. 1973), a case in which a Government operative went to a neighboring state and called a defendant, on orders from an Assistant U.S. Attorney, for the purpose of transforming a local crime into an interstate crime. Once again, the Government's memorandum in opposition to Rep. Kelly's motion was placed under seal by the court.

On November 21, 1980, Rep. Kelly's motion to dismiss Count IV was denied. In its Memorandum and Order the court stated that in the instant case, unlike in *Archer,* there was no evidence that the Government set the situs for the bribe in order to create a Federal crime. The court viewed the Government's use of the Washington, D.C. townhouse, complete with its elaborate sound and videotape system, as entirely legitimate, especially in view of the fact that the townhouse had been in use by the FBI long before the Government could have known that a meeting with Rep. Kelly would necessitate his travel across state lines.

Also on September 15, 1980, Rep. Kelly moved to suppress the audio and video tapes of the alleged crimes. In support, he stated that the taping of his conversations in a private home violated his reasonable expectations of privacy and was contrary to the ruling in *Katz v. United States,* 389 U.S. 347 (1967). The court, on November 21, 1980, rejected this argument and denied the motion, stating:

> The court is not without some sympathy for a private citizen who finds that his most confidential exchanges have been carefully preserved, and, in this case, exhaus-

> tively preserved for public use at trial. But Mr. Kelly's assertion was rejected by the United States Supreme Court a decade ago in *United States v. White,* 401 U.S. 745 (1971).
>
> In *White,* the court held that there is no invasion of the fourth amendment when the government wires its agents and sends them into the home of a defendant for a chat. In *White* itself four of the recorded conversations took place in the home of a government informant. Therefore, the fact that Mr. Kelly's conversations were recorded in a house that was actually rented by the government does nothing to distinguish this case from *White.* In Both *White* and the present case the defendants were recorded in homes they believed were owned by private citizens. Mr. Kelly has no greater claim to privacy under the fourth amendment than did Mr. White. [Memorandum and Order, November 21, 1980, at 2-3]

A third motion filed on September 15, 1980, was Rep. Kelly's motion to dismiss for failure to state an offense. His argument was that a violation of 18 U.S.C. §201(c) occurs when a public official solicits something of value in return for his being influenced in the performance of an official act. Rep. Kelly claimed that he could not possibly have been influenced in the performance of any official act because the requested official act (immigration assistance) could not have been rendered to the foreign businessmen, since, in reality, the foreign businessmen did not exist. Rep. Kelly thus asked that Count II be dismissed. Rep. Kelly further argued that if Count II had to be dismissed, so did Counts I (conspiracy) and IV (interstate travel) because they were predicated on violations of 18 U.S.C. §201(c).

On November 21, 1980, the court denied Rep. Kelly's motion to dismiss for failure to state an offense. In a short memorandum and order, Chief Judge Bryant stated:

> The United States Court of Appeals for the Second Circuit decided this precise issue in a virtually identical setting last August. See *United States v. Myers,* No. 80-1309 (August 8, 1980). The *Myers* court, citing *United States v. Brewster,* 408 U.S. 501, 526-27, upheld the indictment under 18 U.S.C. Section 201, reasoning that "[t]he promise does not cease to relate to an official act simply because the undercover agent offering the bribe knows that the subject of the promised legislative action is fictitious and that the promise will not actually be performed." Slip Opinion at 4931. [Memorandum and Order, November 21, 1980]

Also on September 15, 1980, Rep. Kelly filed a motion entitled "Motion to Dismiss Pursuant to Speech or Debate Clause and Punishment Clause." In his accompanying memorandum, Rep. Kelly stated that many of his present and former staff members were subpoenaed and testified before the grand jury, and that many of his documents were also subpoenaed and turned over to the grand jury. Rep. Kelly argued that if any of the testimony or materials considered by the grand jury involved legislative acts, the indictment would have to be dismissed as violative of the Speech or Debate Clause of the U.S. Constitution.[6] Accordingly, he requested a hearing on the matter. Rep. Kelly also argued that the Punishment Clause of the Constitution,[7] when read in conjunction with the Speech and Debate Clause, deprives the Judicial branch of jurisdiction to question, charge, or punish any Member for legislative misconduct.

On November 25, 1980, defendant Kelly's "Motion to Dismiss Pursuant to Speech or Debate Clause or Punishment Clause" was denied. In its Memorandum and Order, the court stated that speech or debate material was not a substantial factor underlying Rep. Kelly's indictment; nor did the grand jury lack sufficient competent evidence to establish probable cause:

> The question of speech or debate material tainting an indictment has been considered in the recent past by both the United States Court of Appeals for the Second and Third Circuits. *United States v. Helstoski,* No. 80-1592 (3rd Cir. November 3, 1980; *United States v. Myers,* No. 80-1309 (2nd Cir. August 8, 1980). Both courts started from the premise that ordinarily courts do not look behind the face of an indictment and invalidate it because the grand jury received incompetent evidence. *Helstoski,* slip op. at 6; *Myers,* slip op. at 4933. However, in *Helstoski* the court held that since privileged material "permeated the whole [grand jury] proceeding," slip op. at 10, the privileged testimony was "a substantial factor underlying the indictment," slip op. at 7, and the grand jury proceedings were thus "polluted by the presentation of evidence violating the speech or debate clause," slip op. at 6, the district court was correct in dismissing the indictment. In *Myers,* although the Court of Appeals affirmed the district court's denial of a motion to dismiss based on speech or debate material, the court acknowledged in a footnote that under certain conditions a district court might be justified in dismissing an indictment on speech or debate clause grounds. Slip op. at 4934 n.10. The *Myers* court held that such a motion to dismiss might lie if "the privileged evidence constituted such a large proportion of the evidence before the grand jury as to raise a substantial question of whether the grand jury had sufficient competent evidence to establish probable cause." [*Id.*]
>
> Once again it is unnecessary for the court to resolve conflicting standards proposed by other circuit courts. Under either the Third Circuit's "substantial factor underlying the indictment" standard, *Helstoski, supra,* or the Second Circuit's "sufficient competent evidence" standard, *Myers, supra,* Mr. Kelly's motion to dismiss the indictment on speech or debate clause grounds must fail. The court has

---

[6] The Speech or Debate Clause of the U.S. Constitution provides that "for any Speech or Debate in either House, [U.S. Senators and U.S. Representatives] shall not be questioned in any other Place." [art. I, § 6, cl. 1]

[7] The Punishment Clause of the U.S. Constitution provides that "Each House may . . . punish its Members for disorderly Behavior." [art. I, § 5, cl. 2]

> reviewed the grand jury transcripts of associates of Mr. Kelly's. It is clear that speech or debate material was a very small part, if any, of the evidence presented to the grand jury. Further, the many video and audio tapes played for the grand jury resolve any doubt there may be on the sufficiency of nonspeech or debate grand jury evidence. See *Myers, supra* at 4934 n.10 (sustaining Judge Mishler's denial of a motion to dismiss; extensive tapes and recordings held sufficient competent evidence to establish probable cause before the grand jury).[1]
>
> [1] There is no merit whatsoever in Mr. Kelly's assertion that the punishment clause, art. I, §5, cl. 2, deprives the judiciary of jurisdictions over a Congressman. *United States v. Brewster,* 408 U.S. 501 (1972); *United States v. Diggs,* 613 F.2d 988 (D.C. Cir. 1979).

[Memorandum and Order, November 25, 1980, at 1–2]

A fifth motion filed on September 15, 1980 by Rep. Kelly was his motion to dismiss on the grounds of Government overinvolvement and overreaching. His argument was that the investigative tactics used by the Government during the ABSCAM operation were so grossly unfair that they violated his right to due process of law. It was Rep. Kelly's contention that the Government resorted to systematic abuses of law enforcement power to manufacture and then prosecute spurious offenses. After emphasizing that he was *not* claiming that he had been entrapped, the defendant claimed that in both *United States v. Russell,* 411 U.S. 423 (1973) and *Hampton v. United States,* 425 U.S. 484 (1976) a majority of the Court was unwilling to hold that overreaching police conduct could never violate due process rights. The defendant also cited *United States v. Twigg,* 588 F.2d 373 (3rd Cir. 1978) as a case in which the overreaching defense was invoked and sustained. The defendant argued that a careful reading of *Twigg* and *Russell* along with *United States v. Archer* 486 F.2d 670 Cir. 1973), *United States v. Corcione,* 592 F.2d 111 (2d Cir. 1979) *cert. denied* 440 U.S. 985 (1979) and *Greene v. United States,* 454 F.2d 783 (9th Cir. 1971) indicated that a crucial factor in any examination of a law enforcement agent's conduct is the extent to which the agent generated unlawful activity where no unlawful activity had previously existed. The critical distinction, said Rep. Kelly, is between infiltrating *ongoing* criminal operations and initiating previously nonexistent criminal operations. In this regard Rep. Kelly stated that there was never any suggestion that there had ever existed an ongoing bribery conspiracy among Members of Congress that the Government sought to infiltrate. In short, it was alleged that had the Government not set up its fictitious operation and initiated contact with the defendant through its agents, no prosecution could ever have occurred.

Rep. Kelly further argued that court precedents indicate that overreaching is more likely to be found if the defendant can show that the investigating agents violated laws during the course of their investigation. In this vein, the defendant stated that Joseph B. Meltzer, who during the ABSCAM investigation portrayed himself as a top employee of a fictitious foreign businessman, Abdul, used the ABSCAM investigation as a cover to swindle numerous businessmen by promising them that Abdul would provide low interest loans for their business ventures. Rep. Kelly claimed that although the FBI was aware that Mr. Meltzer was defrauding innocent third parties, it took no action to stop him, and actively participated in the cover-up. Whether or not illegal (under 18 U.S.C. §4), said the defendant, the Government's conduct in the Meltzer affair was intolerable. A second example of alleged Government lawbreaking involved the Olympic Construction Company, which leased the Washington, D.C. townhouse where the video and audio tapes of Rep. Kelly were made. According to Rep. Kelly, newspaper reports indicated that the FBI provided Olympic with a $6 million interest free loan in return for Olympic's assistance in the investigation. According to Rep. Kelly, 18 U.S.C. §1001 (false statements) was violated when Olympic filed a contract bid with the Federal Government and failed to disclose the existence of this $6 million liability. Rep. Kelly charged that the Government again broke the law, specifically 18 U.S.C. §1005, when it induced the Chase Manhattan Bank to verify the existence of a fictitious bank account in the name of "Abdul Enterprises" to add credibility to the ABSCAM operation.

On November 7, 1980, the Government filed an opposition to Rep. Kelly's motion to dismiss on the grounds of Government overinvolvement and overreaching.

On December 8, 1980, Rep. Kelly's trial began. On January 26, 1981, he was found guilty on all three counts. Sentencing, which had been scheduled for February 23, 1981, was subsequently deferred, apparently for an indefinite period of time.

On February 10, 1981, Rep. Kelly filed a motion for a new trial and a motion to dismiss on the basis of due process violations (i.e. overreaching).

With respect to the motion to dismiss, Rep. Kelly repeated the arguments he had made in his September 15, 1980 motion to dismiss on the grounds of Government overinvolvement and overreaching. (Apparently, the court decided at some point that it would postpone a decision on that motion until after trial.) In addition, Rep. Kelly argued that: (1) Mr. Weinberg's salary was improper in that it was based upon the success of subsequent prosecutions; (2) the investigation was conducted so as to leave no "paper trail"; and (3) Government investigators failed to exercise effective control over the activities of Mr. Weinberg. With respect to the motion for a new trial, Rep. Kelly argued, *inter alia,* that the verdict was contrary to the weight of the evidence, and that the court erred in refusing to utilize Rep. Kelly's proposed jury instruction regarding bribery.

Also on February 10, 1981, Rep. Kelly filed a motion for judgment of acquittal, arguing that there was no evidence upon which a reasonable person could conclude beyond a reasonable doubt that he was predisposed to commit the crimes alleged in the indictment. Thus, he said, he was entrapped as a matter of law.

On October 30, 1981, the Government filed a memorandum in opposition to Rep. Kelly's motion to dismiss. The Government began by pointing out that "the Supreme Court has never held but only suggested that police 'overinvolvement' in criminal activity might reach 'such proportions as to bar conviction of a predisposed defendant as a matter of due process.' *Hampton v. United States,* 425 U.S. 484, 493 (1976) (Powell, J., concurring); *United States v. Rus-*

sell, 411 U.S. 423, 431–432 (1973)." [Supplemental Opposition to Defendant's Motions to Dismiss Indictment . . ., October 30, 1981 at 2] The Government further stated that since the time the due process concept was first articulated in *Russell* and *Hampton,* the Government prevailed in every reported appellate decision except *United States v. Twigg,* 588 F.2d 373 (3rd Cir. 1978), which the Government called an "aberration."

Next, the Government addressed Rep. Kelly's contention that the investigation was improper because it was not based on any reasonable suspicion that there existed an ongoing bribery conspiracy involving Members of Congress. The Government responded by stating that, as a matter of law, "not even a reasonable or good faith belief is required before an investigation may commence." [*Id.* at 12, citing, *inter alia, United States v. Swets,* 563 F.2d 989, 991 (10th Cir. 1977) and *United States v. Martinez,* 488 F.2d 1088 (9th Cir. 1973)]

Regarding the "paper trail" allegations, the Government responded that Rep. Kelly had failed to show that the absence of any records or memoranda had operated to deny him any constitutional right.

On May 13, 1982, Chief Judge Bryant issued a memorandum and order granting Rep. Kelly's February 10, 1981 motions to dismiss on due process grounds and for a judgment of acquittal. [*United States v. Kelly,* 539 F.Supp. 363 (D.D.C. 1982)] In finding that the investigation of Rep. Kelly had indeed involved outrageous tactics, Judge Bryant found it unnecessary to examine all of the defendant's allegations. Instead, Judge Bryant's decision turned on the fact that the evidence showed that Rep. Kelly had never been suspected of engaging in illegal activity prior to ABSCAM and that Rep. Kelly had *rejected* the *initial* offer of Messrs. Weinberg and Ciuzio to accept the bribe.

Having rejected the initial offer, said Judge Bryant, Rep. Kelly should not have been tested again, for by encouraging Rep. Kelly to accept the bribe after he had twice rejected it, the ABSCAM agents presented Rep. Kelly with a temptation that would not exist in the real world. Said the Judge:

> The litmus test—or temptation—should be one which the individual is likely to encounter in the ordinary course. To offer any other type of temptation does not serve the function of preventing crime by apprehending those who, when faced with actual opportunity, would become criminals. Instead, it creates a whole new type of crime that would not exist but for the government's actions.
>
> When improper proposals are rejected in these virtue-testing ventures, the guinea pig should be left alone. In ordinary real life situations, anyone who would seek to corrupt a Congressman would certainly not continue to press in the face of a rejection for fear of being reported and arrested. The FBI of course had no such restraints in this case. [*Id.* at 374 (footnote omitted)]

In this same vein, Judge Bryant stated:

> Assuming *arguendo* that public officials need even more attention from law enforcement of the type we are dealing with in this case, it should be done within the context of the purposes and efficacy of the bribery statute. Since the statute penalizes both parties to a bribe, it is highly unlikely that anyone other than a government agent immune from prosecution for violating this statute would make repeated flagrant attempts at corrupting a Congressman for fear that the Congressman would notify the FBI. The penalty clause in the statute is a strong deterrent for such conduct. If no one except the FBI can make such persistent attempts, this procedure does not catch criminals, but creates them. [*Id.* at 376]

Regarding the facts in the case, Judge Bryant found that Rep. Kelly first became aware of the bribe offer in late December 1979 when Mr. Ciuzio, a friend of his, told him that foreign businessmen would pay him for immigration assistance. Though Rep. Kelly rejected the offer, he did agree to meet with the "businessmen" because Mr. Ciuzio had told him that they were also interested in legitimately investing money in Rep. Kelly's home district. At that meeting, said Judge Bryant, Rep. Kelly made it apparent that he was there to discuss the legitimate investments, not immigration assistance, yet Agent Amoroso persisted in attempting to induce him to accept the bribe. Finally, Rep. Kelly agreed and accepted $25,000 as an initial payment.

Next, Judge Bryant pointed out that the instant case differed significantly from *Russell* in that the undercover agents in *Russell* did not violate any Federal statute and in *Russell,* which involved a narcotics conviction, the key ingredient in the manufacture of the narcotics, although supplied by Government agents, was obtainable from other sources. Judge Bryant then concluded his opinion:

> To reiterate, I do not believe that testing virtue is a function of law enforcement. But this personal belief aside, and assuming that it is, the method of testing must be fair. If after an illegal offer is made, the subject rejects it in any fashion, the government cannot press on. Certainly when a person recognizes the difference between the legal and the illegal, and rejects the latter, the person should be free of further testing by a device which only government agents could have the audacity to use in the face of the penalties provided for their conduct. This standard creates a workable, discernible line separating the merely offensive and the constitutionally impermissible. Crossing this line is patently outrageous. A person corrupted under circumstances which only police officials can create or by a process which only the authorities are licensed to use, has been made into a criminal by his own government. [*Id.* at 377]

On June 10, 1982, the Government filed a notice of appeal to the U.S. Court of Appeals for the District of Columbia Circuit. [No. 82–1660]

On August 31, 1982, Rep. Kelly filed a motion to dismiss the Government's appeal, arguing that the appeal violated the double jeopardy provision of the Fifth Amendment. According to Rep. Kelly, the instant case involved a *fact-based* judgment of acquittal. Citing *United States v. Martin Linen Supply Co.,* 430 U.S. 564 (1977), Rep. Kelly argued that if a judgment of acquittal is fact-based, as opposed to legally-based, the Government cannot pursue an appeal. Rep. Kelly then argued that Judge Bryant's decision was based on facts:

> If the trial court had relied solely on the issue of due process violations, the court would have merely granted the motion to dismiss and would have denied the post-verdict motion for judgment of acquittal. Judge Bryant, by granting the judgment of acquittal, clearly found under the facts that there was inducement and that predisposition had not been proven. In other words, Judge Bryant found that the facts established that the Appellee was entrapped. [Motion to Dismiss Appeal, August 31, 1982, at 9]

Status—The case is pending in the U.S. Court of Appeals for the District of Columbia Circuit.

The complete text of the May 13, 1982 opinion of the district court is printed in the "Decisions" section of this report at page 660.

United States v. Murphy

and

United States v. Thompson

Nos. 81-1346 and 81-1345 (2d Cir.)

On June 18, 1980, a Federal grand jury in the Eastern District of New York returned a five count indictment against U.S. Representatives Frank Thompson, Jr. of New Jersey and John M. Murphy of New York. Also indicted were Howard L. Criden (a Philadelphia attorney) and Joseph Silvestri. [Criminal Case No. 80-00291 (E.D.N.Y.)]

Count I charged the defendants with conspiracy,[1] contrary to 18 U.S.C. § 371.[2] Specifically it was alleged that sometime between July 26, 1979 and February 2, 1980 defendant Silvestri agreed to introduce defendant Criden to Members of Congress who would be willing, in return for payments, to assist certain foreign businessmen to enter and remain in the United States. These businessmen were purportedly represented by "Tony DeVito" who was, in reality, Anthony Amoroso, Jr., a Special Agent of the Federal Bureau of Investigation ("FBI"). Also supposedly serving as agent for these foreign businessmen was Melvin Weinberg. In reality, however, Mr. Weinberg was a private citizen assisting the FBI.

---

[1] Specifically, conspiracy to violate 18 U.S.C. § 201 (bribery and fraud) and 18 U.S.C. § 203 (conflict of interest).

[2] 18 U.S.C. § 371 provides: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Allegedly, Mr. Silvestri introduced Mr. Criden to Rep. Thompson. A meeting then allegedly took place at which Rep. Thompson received $50,000 (to be shared with Mr. Criden and Mr. Silvestri) from Mr. Weinberg and DeVito. In return, said the indictment, Rep. Thompson gave assurances that he would introduce and support private immigration bills to enable the foreign businessmen to immigrate to the United States. To ensure such immigration, Rep. Thompson also allegedly agreed to exert his influence with those agencies of the United States responsible for enforcing U.S. immigration laws.

Count I further charged that Rep. Thompson introduced Mr. Criden to Rep. Murphy who also agreed to receive, and did receive, $50,000 (to be shared with Rep. Thompson and Mr. Criden) from DeVito and Mr. Weinberg in return for his assurances that he, like Rep. Thompson, would exert his influence as a U.S. Representative to enable the foreign businessmen to immigrate to the United States. In addition, charged Count I, Rep. Murphy agreed to utilize his position as Chairman of the House Committee on Merchant Marine and Fisheries to advance the interests of certain shipping companies. In return, said the indictment, Rep. Murphy would receive from the foreign businessmen a financial interest in the companies.

Count II charged that Reps. Thompson and Murphy by soliciting and receiving money in return for their promises to assist the foreign businessmen with their immigration problems, as described in Count I, committed bribery, contrary to 18 U.S.C. § 201(c).[3]

Count III repeated the allegations of Count II, and charged that such actions and promises by Reps. Thompson and Murphy placed them in a position of conflicting interests contrary to 18 U.S.C. § 203 (a).[4]

Count IV charged that on October 20, 1979, Mr. Criden, aided and abetted by Reps. Thompson and Murphy, traveled interstate (from Pennsylvania to John F. Kennedy International Airport in New York) with intent to promote an unlawful activity, to wit, bribery. Such interstate travel was said to violate 18 U.S.C. § 1952

---

[3] 18 U.S.C. § 201(c) provides: Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(3) being induced to do or omit to do any act in violation of his offical duty, shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both and may be disqualified from holding any office of honor, trust, or point under the United States.

[4] 18 U.S.C. § 203(a) provides, in pertinent part: Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—

(1) at a time when he is a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia. Delegate Elect from the District of Columbia. Resident Commissioner, or Resident Commissioner Elect shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

(Travel Act).[5] Further, Count IV charged that Reps. Thompson and Murphy, by aiding and abetting Mr. Criden, were punishable as principals pursuant to 18 U.S.C. § 2.[6]

Count V charged that Rep. Murphy, by soliciting and receiving payment in exchange for his promise to provide immigration assistance, violated the illegal gratuity statute, 18 U.S.C. § 201(g).[7] Count V also charged Rep. Thompson and Mr. Criden with aiding and abetting Rep. Murphy in the commission of this crime. Accordingly, Rep. Thompson and Mr. Criden were said to be punishable as principals under 18 U.S.C. § 2.

On June 23, 1980, both Rep. Thompson and Rep. Murphy entered pleas of not guilty to all counts.

On July 1, 1980, the Committee on Standards of Official Conduct of the U.S. House of Representatives ("Committee") filed an application for an order authorizing the Department of Justice to disclose to the Committee ABSCAM-related material (except grand jury transcripts) in the custody of the Department or the grand jury. The application explained that under clause 4(e)(1) of Rule X of the Rules of the House, the Committee was authorized to investigate alleged violations by Members of their official duties. The Committee also stated that on March 27, 1980 the House adopted Resolution 608 which specifically directed the Committee to conduct a full investigation into the ABSCAM affair and to report any recommendations for disciplinary action to the full House. The Committee further stated that information sought through the instant application was essential if Congress was to carry out its constitutional function of imposing discipline on its Members. The application concluded by noting that the Committee would take precautions—including requiring Committee Members and Committee Counsel to execute confidentiality agreements—to prevent unnecessary or inappropriate disclosures of materials and information received. On July 14, 1980, the Committee's application was granted.

At some point prior to July 11, 1981 the Government filed a motion for a protective order to prevent Rep. Murphy from showing the Government's videotapes of him to the public. In his July 11, 1980 response to the motion, Rep. Murphy asserted that the Government had been selectively disclosing information concerning the case to the media. The result, charged Rep. Murphy, was that his constituents had been given a distorted and prejudicial accounting of his involvement in the alleged crimes. Unless the court allowed him to disclose *all* the videotapes of his alleged crimes, concluded Rep. Murphy, his constituents would be deprived of their First Amendment right to the free flow of information concerning their elected officials. On July 14, 1981, the Government's motion for a protective order was granted, without opinion, by the court.

---

[5] 18 U.S.C. § 1952 provides, in pertinent part: (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

[6] 18 U.S.C. § provides: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commisson, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[7] 18 U.S.C. § 201(g) provides: Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharges of social duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

On July 11, 1980, the American Civil Liberties Union ("ACLU") submitted an *amicus curiae* brief in support of Rep. Thompson's and Rep. Murphy's motions for a pre-trial hearing to determine whether the indictment should be dismissed because of Government overreaching which may have fatally tainted the entire prosecution.[8] The ACLU stressed that it did not vouch in any way for the facts suggested by the defendants. But if the defendants' allegations were proven, said the ACLU, they would represent a reprehensible misuse of prosecutorial power. The brief then set forth the allegations of Government overreaching which concerned the ACLU:

> 1. Federal prosecutors are said to have invented a criminal scenario, replete with fictitious actors, and set their witting and unwitting agents at large to see which public officials might be beguiled and seduced into compromising and incriminating situations.
>
> 2. Agents were reportedly encouraged—possibly by promises of handsome rewards—to ensnare persons of substantial public repute, particularly members of the federal legislative branch.
>
> 3. Targets for this operation were reportedly selected only because of their public stature—particularly their legislative prominence—and unrelated to any prior conduct which would in any way indicate that they were corrupt individuals or had engaged in any unlawful activity.
>
> 4. The selected targets were lured to a spot where their words could be secretly recorded and their actions secretly filmed while they were apparently being deceived into believing that they were in fact engaged in discussions involving legitimate subjects of legislative concern.
>
> 5. Even before any of the events that transpired could be properly evaluated for possible criminal violations, agents of the federal government apparently deliberately leaked (often false and misleading) accounts of these events to the news media to ensure that certain political reputations were ruined whether or not the appropriate authorities found sufficient evidence upon which to base criminal prosecutions.
>
> 6. There appears to have been no adequate controls to limit exercise of prosecutorial discretion to guarantee that targets were not being selected for invidious reasons of either personal malice or political vengeance. [Brief *Amici Curiae* of the American Civil Liberties Union in Support of Defendants' Motion For a Pre-Trial Hearing . . ., July 11, 1980, at 4–5]

---

[8] Apparently Rep. Thompson and Rep. Murphy had made their motions orally, since the docket sheets do not reflect the filing of such motions.

Government misconduct of the type alleged by the defendants, said the ACLU, threatens settled principles of separation of powers because Members of Congress will not be "willing to risk invoking the wrath of the Executive if they know the Executive has the authority to conduct exhaustive investigations of its legislative foes and entice them into wrong-doing even without any cause whatsoever to focus on them as individuals[.]" [*Id.* at 10] The ACLU further asserted that if the allegations were proven the pre-trial dismissal of the indictment would be required. Accordingly, the ACLU called on the court to conduct a pre-trial hearing on the matter since "the burden of standing trial, irrespective of the possibility of eventual conviction, may place a substantial burden on the rights of political freedom." [*Id.* at 14]

On August 7, 1980, Judge Mishler issued a memorandum and order addressing the issue of Government misconduct. The Judge noted that Federal courts do indeed have the power to preclude a criminal prosecution because of investigative misconduct by the Government. The court would entertain the defendant's motion, said the Judge, but not before trial as had been requested. Because the defendants were challenging almost every facet of the investigation, the court concluded that a pre-trial hearing would unduly delay the trial. Further, said Judge Mishler, the publicity that would undoubtedly surround such a pre-trial hearing would make it difficult to select an unbiased jury. Accordingly, the court reserved ruling on the defendants' motion until the conclusion of the Government's case at which point hearings on the matter would be conducted if necessary.

On July 11, 1981, Reps. Murphy and Thompson had filed a motion to dismiss on the ground of prejudicial pre-indictment publicity and Government misconduct. Regarding publicity, they alleged that top officials of the Justice Department and the FBI, as well as members of the United States Attorney's Office and other members of the Government involved with ABSCAM, had publicly discussed such matters as: (1) the relative strength of the Government's case; (2) the character, motivation, and guilt of the defendants; (3) the rulings a judge should make on various legal issues, such as the entrapment defense; (4) the legality of the investigative procedures used; and (5) the proper interpretation of the videotapes. The defendants relied on *Berger v. United States,* 295 U.S. 78 (1934) in arguing that this pretrial publicity would deny them their due process right to a fair trial, and that the indictment therefore should be dismissed. Regarding Government misconduct, they stated that the Government violated Rule 6(e) of the Federal Rules of Criminal Procedure and Justice Department regulations (28 CFR § 50.2) by disclosing publicly matters occurring before the grand jury. These disclosures allegedly involved: (1) detailed descriptions of videotapes which were to be shown to the grand jury; (2) the dates when indictments were expected; and (3) the charges expected to be contained in the indictment. They further asserted that these actions by the Government may have well violated two Federal statutes: 5 U.S.C. § 552a[b] (the Privacy Act) and 18 U.S.C. § 1501 (obstruction of justice). Reps. Murphy and Thompson concluded by calling upon the court to demonstrate its intolerance of the Government's conduct by exercising its supervisory power to dismiss the indictment.

On August 7, 1980, Reps. Murphy and Thompson's motion to dismiss on the grounds of prejudicial pre-indictment publicity and government misconduct was denied. In an opinion accompanying the order, Judge Mishler noted that the conduct of the Government officers who disclosed information of the investigation was "grossly improper and possibly illegal." [*United States v. Thompson et al.*, Cr. No. 80-00291 (E.D.N.Y.), Memorandum of Decision and Order, August 7, 1980, at 7] Nevertheless, Judge Mishler held that neither the Fifth Amendment nor any requirement that the judiciary oversee the proper administration of criminal justice mandated dismissal of the indictment. Turning to the defendants' Fifth Amendment claim, Judge Mishler stated that he knew of no case in which an indictment had been dismissed upon the ground that the grand jury was prejudiced by pre-indictment publicity. Moreover, said Judge Mishler, in order to prevail on their Fifth Amendment argument, the defendants would have to bear a heavy burden of demonstrating that they suffered actual prejudice as a result of the publicity. In so holding, Judge Mishler recognized that in *United States v. Sweig,* 316 F. Supp. 1148 (S.D. N.Y. 1970), *aff'd* 441 F.2d 114 (2d Cir. 1970) Judge Frankel had suggested, in *dicta,* that Government generated pre-indictment publicity could be grounds for dismissal even without a showing of actual prejudice. Judge Mishler, however, held that because "other measures are available to deter and punish prosecutorial conduct," it would be inappropriate to give the defendants a "windfall" by dismissing the indictment "simply because some unidentified and possibly low-level member of the prosecutor's office failed to adhere to his duty." [*Id.* at 13] In coming to this conclusion, Judge Mishler relied on *United States v. Stanford,* 589 F.2d 299 (7th Cir. 1978), *cert. denied* 440 U.S. 983 (1979).

The court turned next to the claim that the indictment should be dismissed pursuant to the court's supervisory power to discourage Government misconduct. Judge Mishler began by stating that courts undoubtedly have supervisory authority over the administration of justice, but that this authority must be invoked with extreme care. He called dismissal of an indictment an "extreme sanction" and stated that under *United States v. Fields,* 592 F.2d 638, 647 (2d Cir. 1978) *cert. denied,* 442 U.S. 917 (1979) dismissal is warranted only

> . . . to achieve one or both of two objectives: first, to eliminate prejudice to a defendant in a criminal prosecution; second, to help to translate the assurances of the United States attorneys into consistent performances by their assistants.

As to the first situation described in *Fields,* Judge Mishler stated that Reps. Murphy and Thompson had failed to show actual prejudice. As to whether dismissal would "help to translate assurances of the United States Attorneys into consistent performances by their assistants," Judge Mishler held that it would not. He stated that the *Fields* court had been referring to situations such as those exemplified by *United States v. Estepa,* 471, F.2d 1132 (2d Cir.

1972)—a case in which an indictment was dismissed because the prosecutor had failed to heed repeated warnings by the court to use hearsay evidence before the grand jury. In the present case, said Judge Mishler, this pattern of constant disregard of court directives was absent. Further, the present case did not fall within the ambit of *Fields* because here the Attorney General, by instituting an investigation of the disclosures and publicly promising to deal severely with the guilty employees, would provide any necessary deterrence against future Government misconduct.

On July 11, 1980 (the same day they filed their original motion to dismiss on the ground of prejudicial pre-indictment publicity), Reps. Murphy and Thompson filed a motion to dismiss the indictment as violative of the Speech or Debate Clause of the U.S. Constitution.[9] The defendants argued that the grand jury which returned their indictments had probably considered evidence reflecting on their official actions as Members of Congress. In support of this contention, the defendants claimed that several portions of the indictment contained allegations of facts that would compel one to believe that evidence protected by the Clause had been considered. The defendants stated that when an indictment has been tainted by a grand jury's consideration of matters protected by the Clause the only remedy is dismissal of the indictment. In support of this contention, Reps. Murphy and Thompson cited the opinion of U.S. District Court Judge Curtis Meanor in *United States v. Helstoski.* (See page 71 of *Court Proceedings and Actions of Vital Interest to the Congress,* March 1, 1981 for a discussion of that case.) In any event, said the defendants, they should be allowed to review the grand jury transcripts to see if violations of the Speech or Debate Clause did indeed occur.

On July 11, 1980 (the same day it was filed), the motion to dismiss on Speech or Debate Clause grounds was denied. No opinion accompanied the court's order. Four days later, the defendants filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit.

On August 26, 1980, the circuit court issued a decision affirming the ruling of the district court. [*United States v. Murphy et al.,* 642 F.2d 699 (2d Cir. 1980)] The circuit court found that the arguments raised by the defendants had previously been rejected in *United States v. Myers,* 635 F.2d 932 (2d Cir. 1980). (See page 37 of this report for a discussion of that case.) According to the court, the factual situation in *Myers* was "not different in any material respect" from the factual situation in the present case. [642 F.2d at 700] In addition, neither the defendant in *Myers* nor the defendants here had made any claim "that the grand jury did not hear significant and sufficient evidence unprotected by the Speech or Debate Clause . . ." [*Id.*]

On November 10, 1980, the trial of Reps. Thompson and Murphy began, and on December 3, 1980 the jury returned its verdict. Rep. Murphy was found guilty under Count I (conspiracy), Count III (conflict of interest), and that portion of Count V concerning illegal gratuities. Rep. Murphy was found not guilty under Count II (bribery). Pursuant to the court's instruction during trial, Count IV (interstate travel) was dismissed. Similarly, Rep. Thompson was found guilty under Count I and part of Count V. Unlike Rep. Murphy, however, he was found guilty of bribery. He was found not guilty under Count III. During trial, Count IV was dismissed.

---

[9] The Speech or Debate Clause of the U.S. Constitution provides that "for any Speech or Debate in either House, [U.S. Senators and U.S. Representatives] shall not be questioned in any other Place." [art. I, § 6, cl. 1]

On January 12, 1981, the court commenced a series of hearings on the Government overreaching claims of Reps. Murphy and Thompson. The issues considered during these hearings were: (1) whether the ABSCAM operation amounted to Government overinvolvement in the creation or manufacture of the crimes; (2) whether there were specific incidents of misconduct in the ABSCAM operation by Government operatives over and above any Government involvement in the creation of the crimes; (3) whether in the conduct of the operation there were specific violations of statutes, regulations, or guidelines binding on the Government; (4) whether there was impermissible targeting or selection of individuals for investigation and prosecution in the ABSCAM operation; and (5) whether the evidence in either of the cases established entrapment as a matter of law. These due process hearings ended on February 16, 1981.

On March 19, 1981, Rep. Thompson filed a memorandum in support of his motion to dismiss the indictment on due process grounds. Rep. Murphy apparently did not file a post-trial due process memorandum. The Government filed a memorandum in response to Rep. Thompson's and Rep. Murphy's claims on May 1, 1981.

On July 24, 1981, Judge Pratt issued an order and memorandum in which the due process claims of Reps. Thompson and Murphy were denied. In his 136 page memorandum, Judge Pratt began his discussion of the case by outlining the claims Reps. Thompson and Murphy had made:

> Defendant Thompson . . . urges what he characterizes as "the doctrine of governmental overreaching" as requiring dismissal here because the government instigated rather than discovered the crimes and because its selection of "targets" was arbitrary and unprincipled. Thompson further urges that the indictment should be dismissed because in the course of the Abscam investigation there were widespread and continuous violations of laws, regulations and guidelines in the control and monitoring of the informant Weinberg, in using Criden and other "middle men", in lacking reasonable suspicion before bringing public officials before the video cameras, and in ignoring or disregarding "red flags" and substantial legal questions that arose. Thompson further argues that inadequate documentation of the investigation, unauthorized disclosures of information to the press by the government, attempts by the government to intimidate witnesses, failure to observe the requirements of *Brady v. Maryland,* 373 U.S. 83 (1973), and other possible violations of law require dismissal of the indictment against him. Finally, Thompson urges that

> the circumstances of his involvement with Abscam constitute entrapment as a matter of law.
>
> Defendant Murphy argues that the government's conduct of the Abscam investigation violated principles of fundamental fairness because the justice department targeted congressmen in violation of principles of separation of powers and the speech or debate clause, failed to take into account the nature of Murphy's duties as a legislator, and failed to consider the right of all citizens to petition Congress and Congressmen Murphy for redress of grievances. Murphy further argues that his prosecution was the product of governmental overreaching in the creation and promotion of crime and that the government's outrageous creative activity was designed to lure Murphy into criminality without any indication of his predisposition or prior agreement to engage in wrongdoing. He further argues that as to him the government deliberately or recklessly created ambiguous and misleading evidence of criminality. Murphy's final argument focuses upon claimed misconduct by the government in the Abscam investigation and prosecution, and argues that the misconduct caused him specific prejudice. He contends that dismissal of the indictment would not harm any legitimate law enforcement purpose, but on the contrary would serve as a deterrent against any future Abscam-type abuses. [Memorandum and Order, July 24, 1981, at 33–34]

Next, Judge Pratt outlined the Government's response [10] to the defendants' arguments:

> The government argues that the Abscam investigation in its totality was both appropriate and constitutional, that the rights of none of the defendants were violated by the investigation and that there was no exculpatory evidence withheld from the defense. In the government's view, all of the defendants' "due process" contentions basically fall into two categories, neither of which has validity: governmental "over-involvement" in the creation of criminal activity, and the government's failure to take measures to ensure that innocent people would not be wrongfully ensnared and convicted. The government urges that defendants' claims
>
> > cannot be considered in the abstract, for the facts as developed at the trials reveals [sic] a collection of unscrupulous public officials who were never "victimized" by the informant or the intermediaries and whose guilt was clear because they were clearly guilty, not because they had been manipu-

---

[10] Judge Pratt's July 24th order and memorandum was dispositive not only of Rep. Thompson's and Rep. Murphy's due process claims, but also of the claims of Reps. Lederer and Myers who raised similar due process issues during their ABSCAM prosecutions. As a result, the Government's response addressed the claims not only of Reps. Thompson and Murphy, but also of Reps. Lederer and Myers. Further, whenever in Judge Pratt's memorandum reference is made to the "defendants" it should be understood that the court is referring not only to Reps. Thompson and Murphy and those indicted with them, but also to all the defendants in the *Myers* and *Lederer* ABSCAM cases.

> lated to appear in compromising positions before the cameras.
>
> Government's memorandum at 1.
>
> The government further argues that the Abscam investigation was pursued in good faith and conducted professionally in view of the circumstances, that no right of any defendant was infringed and, finally, that whether an operation such as Abscam is "good" or "bad" is a matter to be decided initially by the executive branch of our government, subject to legislation by Congress, but does not present judicial questions under the due process clause. [*Id.* at 35-36]

The court then proceeded to group the defendant's challenges into two categories: general and specific. The court found that there were six general challenges, the first of which was that "the indictment should be dismissed because the Abscam investigation did not uncover criminal conduct, but instead created and instigated it." [*Id.* at 49] Before addressing the merits of this attack Judge Pratt discussed at length the law of entrapment.[11] Having reviewed the law of entrapment, Judge Pratt found that the argument that prosecution must be barred whenever a Government agent provided the impetus for a crime, "simply does not represent the law as established by the United States Supreme Court." [*Id.* at 50] Thus, since the concept of "objective entrapment" had never been recognized by the Supreme Court, the defendants' entrapment claim was "restricted to principles of subjective entrapment, where the creative activity of the government entraps into criminal conduct a defendant who was not predisposed to commit the crime." [*Id.*] However, said the court, the issue of predisposition is generally a question of fact to be determined by a jury. In the instant case, the court continued, neither Rep. Thompson nor Rep. Murphy had requested a jury charge on the question of entrapment. Thus, the issue of subjective entrapment could not now be raised before the court.

The second general challenge raised by Reps. Thompson and Murphy was that even if they had not been entrapped, the indictments should be dismissed because the Government's handling of the investigation was so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain convictions. After noting that the defendants' argument was based on the opinions of Justice Rehnquist in *Russell* and *Hampton*, the court disposed of this challenge by stating:

> It is important to recognize, however, that in neither *Russell* nor *Hampton* was the questioned governmental conduct held to be "outrageous". Nor has any other decision of the Supreme Court found law enforcement officers' conduct to be so "outrageous" as to require dismissal of an indictment. Thus, even though the Supreme Court has yet to be confronted with or to offer a description of circumstances sufficiently outrageous to warrant dismissal, the governing principle remains that in some case, under some

---

[11] Judge Pratt's discussion of entrapment is printed on pages 50 through 53 of this report.

> circumstances, the conduct of law enforcement officials may some day bar prosecution. Defendants argue that those cases, those circumstances and that conduct have arrived with Abscam.
>
> It is clear that mere instigation of the crime does not render law enforcement activity "outrageous". Here, the government presented a fictitious sheik, seeking to buy favorable legislative action. Undercover agents offered money in return for defendant legislators' promises to introduce a private immigration bill. In simple terms, bribes were offered by the undercover agents and accepted by the defendant congressmen.
>
> Clearly, the government agents created the opportunity for criminal conduct by offering the bribes. But their involvement falls far short of being "outrageous" for two reasons. In the first place, each of the legislators could simply have said "no" to the offer. *U.S. v. Myers,* 635 F.2d at 939. *Three* other legislators faced with identical offers, Senator Pressler, Congressman Patten and Congressman Murtha did precisely that as shown by the videotapes in evidence as DP Exs. 22, 21, and *Thompson* trial Ex. 29. Second, the extent of governmental involvement here is far less than that in *Hampton,* where the government not only supplied heroin for the defendant to sell, but also produced an undercover agent to buy it from him. Even under those circumstances, where the government was active on both sides of a narcotics sale, the Supreme Court did not consider the agents' conduct to be "outrageous"; *a fortiori* here, where the agents acted only on one side, by offering money to congressmen in return for favors, the involvement of the undercover agents was not "outrageous".
> [*Id.* at 52-54 (footnotes omitted)]

The defendants' third general challenge was that "to permit targets to be selected by middlemen violated due process because it did not provide sufficient protection to the innocent." [*Id.* at 54] This argument, said the court, was both legally and factually unsupportable. It was legally infirm, said the court, because "the Constitution does not require reasonable suspicion before a congressman may be made the subject of an undercover sting. *U.S. v. Myers,* 635 F.2d at 940-941. See also *U.S. v. Ordner,* 544 F.2d 24 (CA2 1977)." [*Id.* at 54-55] The argument was factually infirm because "the agents did not set out to offer bribes to any particular congressman. They set no standards, established no criteria." [*Id.*]

The defendants' fourth general argument was that "the inducements offered to the congressmen were overwhelming, designed to overpower their otherwise adequate resistance and to induce honest and innocent people to commit a crime they would normally avoid." [*Id.* at 57 (footnote omitted)] Judge Pratt rejected this argument, stating that the size of the inducement was irrelevant:

> While there may be "inducements" that are "overwhelming, such as a threat against the life of a loved one, when the inducement is nothing but money or other personal gain, this court does not believe that the size of the

> inducement should be a determinative factor in whether a public official can be prosecuted for accepting it. No matter how much money is offered to a government official as a bribe or gratuity, he should be punished if he accepts. It may be true, as has been suggested to the court, that "every man has his price"; but when that price is money only, the public official should be required to pay the penalty when he gets caught. In short, as a matter of law, the amount of the financial inducements here could not render the agents' conduct outrageous or unconstitutional. [*Id.* at 59]

The defendants' fifth argument was that there was no need for the Government to establish a wholly fictitious operation to ferret out public corruption. The court readily dismissed this argument, stating:

> This court believes that the great majority of government officials, including those in Congress, are honest, hard-working, dedicated and sincere. However, the government needs to have available the weapons of undercover operations, infiltration of bribery schemes, and "sting" operations such as Abscam in order to expose those officials who are corrupt, to deter others who might be tempted to be corrupt, and perhaps most importantly, to praise by negative example those who are honest and square-dealing. Without the availability of such tactics, only rarely would the government be able to expose and prosecute bribery and other forms of political corruption. [*Id.* at 63–64]

Turning to the last of the general challenges—that the convictions were not a reliable measure of their culpability—the court stated that because the essence of the Government's case consisted of videotapes, "A more reliable basis for conviction can hardly be imagined." [*Id.* at 64]

Next, the court considered a number of specific challenges to the operation of ABSCAM. The defendants' first argument was that ABSCAM was conducted without adequate safeguards, particularly with respect to the supervision of Mr. Weinberg. The problem with the argument, however, said the court, was that neither Rep. Thompson nor Rep. Murphy had shown "any direct or specific harm resulting from the alleged lack of supervision." [*Id.* at 66] Moreover, the supervision of Mr. Weinberg, according to the court, was in fact "more than adequate to the circumstances of this investigation." [*Id.*] In this regard the court stated:

> In an investigation that spanned many months and meetings all along the coast, Weinberg was in virtually daily contact with Amoroso, and his recordings were delivered to the FBI for transcribing on a periodic basis. Most importantly, the key events on which the government relied in presenting its cases, the appearances before the videotape cameras, took place in the presence of the FBI agents, and occasionally under the direct supervision of an attorney from the Eastern District Strike Force. Beyond

> that, supervising agent Good and strike force chief Puccio continually monitored the progress of the investigation, and each reported regularly to their respective superiors in the bureau and the Department of Justice. [*Id.* at 67-68]

Next, Judge Pratt addressed Rep. Thompson's and Rep. Murphy's contention that they were prejudiced at trial by the fact that many of the audiotapes made by Mr. Weinberg either contained gaps or were missing. The court disposed of these arguments by finding that no evidence had been introduced to support the assertion that the unrecorded or missing conversations were important.

The defendants' third specific argument was that dismissal of the indictment was required because during the investigation Government officials violated numerous laws, regulations, and guidelines. Like its predecessors, this argument was rejected by the court. "It is clear", said Judge Pratt, "that for a court to dismiss an indictment there must be not only a constitutional violation, but also some resulting adverse effect or prejudice to the defendant." [*Id.* at 71-72 (citation omitted)] In the instant case, concluded Judge Pratt, the defendants had shown neither a constitutional violation nor any resulting prejudice.

Another argument raised by Reps. Thompson and Murphy was that the Government's use of middlemen such as Messrs. Criden, Errichetti, and Silvestri was an irresponsible attempt to insulate the Government from its responsibility to conduct a fair investigation. In effect, said the defendants, the Government had used these middlemen as its agents and was now responsible for the machinations of those middlemen. In discussing their assertion, Judge Pratt termed it "ludicrous." In the court's view, the Government's use of middlemen "was no more improper than an undercover agent's infiltration of a drug ring in order to gain the confidence of its members and obtain evidence necessary for conviction. *U.S. v. Russell,* 411 U.S. at 432." [*Id.* at 83]

The last major due process challenge concerned the conduct of Mr. Weinberg. It was the defendants' belief that "the government knew that Weinberg was untrustworthy and that defendants' due process rights were violated when the government permitted such a person to play a major role in Abscam." [*Id.* at 93] Judge Pratt addressed this contention by conceding that Mr. Weinberg had an "unsavory background." [*Id.* at 94] But it was precisely because of this background, said Judge Pratt, that Mr. Weinberg was so valuable:

> [Mr. Weinberg's] ability to lie convincingly, his understanding of the corrupt mind and his ability to imagine and execute a grand charade on the scale of Abscam [was the reason] that Weinberg was enlisted for the investigation. Further, Weinberg gave considerable credibility to the entire undercover operation; persons dealing with Weinberg in the context of Abscam could check him out with other sources and be wrongly assured that they were not dealing with government agents. Weinberg had a track record that no legitimate government agent could provide or falsify.

> Moreover, the government was not required to find Weinberg "reliable", as would be the case if he were an informant whose information was used to obtain a search warrant . . . [T]he basic reliability for the investigation, and ultimately for the prosecutions, was guaranteed by having the crimes committed on camera under circumstances guided by Agent Amoroso and closely supervised by Agent Good. [*Id.*]

With respect to the defendants' additional argument—that Mr. Weinberg had been given an exorbitant salary by the Government, and that he was promised a bonus for each conviction—Judge Pratt found that in point of fact Mr. Weinberg's remuneration was neither exorbitant nor contingent in any way upon convictions. In addressing the alleged contingent fee agreement, Judge Pratt said:

> Here the court finds that Weinberg's payments in Abscam have not been contingent. Even if they were, however, that would be but one more fact to be weighed in determining the reliability of the results obtained. Payments to informants contingent upon successful prosecution of those with whom they deal have been judicially criticized, but such payments do not require dismissal of an indictment. *See, e.g., U.S. v. Brown,* 602 F.2d 1073 (CA 2 1979); *U.S. v. Szycher,* 585 F.2d 443 (CA 10 1978). [*Id.* at 96]

In addressing the amount of Mr. Weinberg's salary, Judge Pratt said:

> Whether his contribution to law enforcement in these cases and the personal sacrifices [Mr. Weinberg] has endured, during both the investigation and the prosecutions, are worth the amount of money the government has conferred upon him, is perhaps a matter for serious consideration by the justice department and even by congress. It is not, however, a matter upon which this court will pass judgment for purposes of determing whether the fruits of his activities on behalf of the government should be dismissed. How much money is paid to a government informant is peculiarly a decision for the executive department, and not one for judicial review at the behest of a defendant who was caught by the informant's activities. [*Id.* at 97]

Judge Pratt concluded his memorandum by addressing—and rejecting—a number of arguments Reps. Thompson and Murphy had made in support of motions they had made for a new trial and for a judgment of acquittal.

On August 13, 1981, Rep. Murphy was sentenced to 3 years imprisonment on Count I, and 2 years imprisonment on each of Counts III and V. The sentences, however, were to be served concurrently. In addition, Rep. Murphy was fined $10,000 for his conviction under Count I and $10,000 for his conviction under Count III, for a total fine of $20,000. Execution of the prison sentence was stayed pending Rep. Murphy's appeal. The notice of appeal to the U.S. Court of Appeals for the Second Circuit was filed on August 24, 1981. [No. 81-1346]

Rep. Thompson was likewise sentenced on August 13. Judge Pratt ordered him imprisoned "for the maximum period authorized by law." (This would amount to an imprisonment of 22 years.) However, the court ordered that the Director of the Bureau of Prisons furnish to the court a background report on Rep. Thompson together with any recommendations he might have with respect to probation. (See 18 U.S.C. § 4205.) However, execution of the prison sentence was stayed pending the filing of an appeal. Rep. Thompson's notice of appeal to the U.S. Court of Appeals for the Second Circuit was filed on August 24, 1981. [No. 81-1345]

Rep. Murphy's appellate brief was filed on January 18, 1982. Rep. Thompson's brief was filed on January 27, 1982. In these briefs, both defendants alleged that erroneous jury instructions had been given. Moreover, each defendant set out at great length the facts and circumstances which in their view showed that the investigation was conducted in so outrageous a manner as to warrant dismissal under the Due Process Clause of the Fifth Amendment.

The Government's brief, which responded to both briefs, was filed on February 19, 1982.

On March 3, 1982, and March 31, 1982, Reps. Murphy and Thompson, respectively, filed reply briefs, and on April 5, 1982 the case was argued before circuit judges Lombard, Friendly, and Newman.

Status—The case is pending in the U.S. Court of Appeals for the Second Circuit.

The complete text of the August 26, 1980 opinion of the circuit court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* March 1, 1981.

The complete text of the July 24, 1981 memorandum and order of the district court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress, September 1, 1981.*

United States v. Lederer

No. 81-1347 (2d Cir.)

On May 28, 1980, U.S. Representative Raymond F. Lederer of Pennsylvania was indicted by a Federal grand jury in the U.S. District Court for the Eastern District of New York. Indicted with Rep. Lederer were Angelo J. Errichetti, the Mayor of Camden, New Jersey and a member of the new Jersey State Senate; Howard L. Criden, a Philadelphia attorney; and Louis C. Johanson, a member of the Philadelphia City Council, and a member of Mr. Criden's law firm. [Criminal Case No. 80-00253 (E.D.N.Y.)]

Count I of the four count indictment charged the defendants with conspiracy,[1] contrary to 18 U.S.C. § 371.[2] Specifically, it was alleged that on September 3, 1979, defendant Errichetti informed

---

[1] Specifically, conspiracy to violate 18 U.S.C. § 201 (bribery and fraud).

[2] 18 U.S.C. § 371 provides: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment of such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

"Tony DeVito" and Melvin Weinberg that Rep. Lederer, in return for $50,000, would assist businessmen from the Middle East to enter and remain in the United States. Purportedly, DeVito and Mr. Weinberg were agents of these foreign businessmen. In reality, however, DeVito and Anthony Amoroso, Jr., a Special Agent of the Federal Bureau of Investigation ("FBI"), and Mr. Weinberg was a private citizen assisting the FBI.

It was further alleged that on September 11, 1979, Rep. Lederer and Mr. Errichetti had a meeting with DeVito and Mr. Weinberg at which Rep. Lederer was paid $50,000. In return, said Count I, Rep. Lederer assured Mr. Weinberg and DeVito that he would introduce in Congress private immigration bills designed to ensure the lawful immigration of the foreign businessmen. According to Count I, this $50,000 was then delivered to defendant Criden who placed it in a safety deposit box. As for Mr. Johanson, it was alleged that he withdrew $5,000 from the safety deposit box for delivery to Rep. Lederer. Finally, it was alleged that the $50,000 was to be divided among all the defendants.

Count II charged that by soliciting and receiving $50,000 in return for his promise to introduce private immigration bills, as alleged in Count I, Rep. Lederer committed bribery, contrary to 18 U.S.C. § 201(c).[3] The remaining defendants were charged with aiding and abetting Rep. Lederer in the commission of bribery. Accordingly, they were charged with criminal liability as principals, pursuant to 18 U.S.C. § 2.[4]

Count III stated that Rep. Lederer, by agreeing to introduce private immigration bills in return for $50,000, violated the illegal gratuity statute, 18 U.S.C. § 201(g).[5] Again, the remaining defendants were charged with aiding and abetting Rep. Lederer, thereby incurring liability pursuant to 18 U.S.C. § 2.

Count IV charged that on September 10 and 11, 1979, the defendants traveled in interstate commerce (from Washington, D.C., New Jersey, and Pennsylvania to New York) with intent to promote unlawful activity, to wit, bribery. Such travel was said to violate 18 U.S.C. § 1952 (Travel Act).[6]

---

[3] 18 U.S.C. § 201(c) provides: Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) being induced to do or omit to do any act in violation of his official duty shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

[4] 18 U.S.C, § 2 provides: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[5] 18 U.S.C. § 201(g) provides: Whoever, being a public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[6] 18 U.S.C. § 1952 provides, in pertinent part: (a) Whoever travels in interstate of foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

Continued

On June 5, 1980, Rep. Lederer entered a plea of not guilty to all counts.

On July 1, 1980, the Committee on Standards of Official Conduct of the U.S. House of Representatives ("Committee") filed an application for an order authorizing the Department of Justice to disclose to the Committee ABSCAM-related material (except grand jury transcripts) in the custody of the Department or the grand jury. The application explained that under clause 4(e)(1) of Rule X of the Rules of the House, the Committee was authorized to investigate alleged violations by Members of their official duties. The Committee also stated that on March 27, 1980 the House adopted Resolution 608 which specifically directed the Committee to conduct a full investigation into the ABSCAM affair and to report any recommendations for disciplinary action to the full House. The Committee further stated that the information sought through the instant application was essential if Congress was to carry out its constitutional function of imposing discipline on its Members. The application concluded by noting that the Committee would take precautions—including requiring Committee Members and Committee counsel to execute confidentiality agreements—to prevent unnecessary or inappropriate disclosures of materials and information received. On July 14, 1980, the Committee's application was granted.

On July 8, 1980, Rep. Lederer filed a motion to dismiss on the grounds of prosecutorial misconduct and prejudicial pre-indictment publicity. According to the defendant, prejudicial information concerning ABSCAM and the defendant had been both leaked and openly disclosed to the media. These prejudicial disclosures—

> have included extensive comments to the press and public testimony on the specifics of the ABSCAM matter by the Attorney General of the United States, the Assistant Attorney General for the Criminal Division, and the Director of the FBI. Moreover the Director of the FBI has given televised interviews and comments on the investigation. Voluminous news stories have directly quoted "government sources," "federal prosecutors," "federal investigators," and "sources close to the investigation" as having provided information contained in the stories and referring to matters known only to the government and which could have been leaked only by the government. These disclosures and leaks in turn generated an astounding array of newspaper articles, editorials, opinion columns, and radio and television spots recounting and commenting on the "facts" of the ABSCAM investigation. [Memorandum of Law in Support of Motion to Dismiss Indictment on Grounds of Prosecutorial Misconduct and Prejudicial Pre-Indictment Publicity, July 8, 1980, at 3–4]

---

(1) distribute the proceeds of any unlawful activity: or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

The defendant explained that the leaks and disclosures were prejudicial not only because they "purport to disclose to the entire nation the supposed facts of the case . . . thereby 'indicting' persons in the press before any jury has been convened," but also because "they create a general atmosphere in which the grand jurors are expected to 'do their duty' as the governments sees it in light of the 'overall significance' of the case." [*Id.* at 6] After quoting a variety of ABSCAM-related comments as they appeared in the media, Rep. Lederer asserted that such disclosures and leaks by the Government not only violated his Fifth Amendment right to due process of law but also violated Rule 6(e) of the Federal Rules of Criminal Procedure (dealing with grand jury secrecy), the Privacy Act (5 U.S.C. § 552a[b]). Justice Department regulations (28 C.F.R. § 16.56) and the American Bar Association Code of Professional Responsibility (specifically, Disciplinary Rule 7-107). Rep. Lederer called on the court to take "stern measures . . . to assure the public that such breaches of law by the Government will not be tolerated in our judicial system." [*Id.* at 28] Rep. Lederer thus concluded that dismissal of the indictment was mandated by the Government's misconduct as well as by the resulting prejudice. Rep. Lederer maintained, however, that under *Estes v. United States*, 381 U.S. 538 (1965) it was not necessary for him to show actual prejudice where, as here, the Government's conduct was inherently prejudicial.

On August 7, 1980, Rep. Lederer's motion to dismiss on the grounds of prejudicial pre-indictment publicity and prosecutorial misconduct was denied. In an opinion accompanying the order, Judge Mishler noted that the conduct of the government officers who disclosed information of the investigation was "grossly improper and possibly illegal." [*United States v. Lederer*, Cr. No. 80-00253 (E.D.N.Y.) Memorandum of Decision and Order, August 7, 1980, at 7] Nevertheless, Judge Mishler held that neither the Fifth Amendment nor any requirement that the judiciary oversee the proper administration of criminal justice mandated dismissal of the indictment. Turning to Rep. Lederer's Fifth Amendment claim, Judge Mishler stated that he knew of no case in which an indictment had been dismissed upon the ground that the grand jury was prejudiced by pre-indictment publicity. Moreover, said Judge Mishler, in order to prevail on his Fifth Amendment argument, Rep. Lederer would have to bear a heavy burden of demonstrating that he suffered *actual* prejudice as a result of the publicity. In so holding, Judge Mishler recognized that in *United States v. Sweig*, 316 F. Supp. 1148 (S.D.N.Y. 1970), *aff'd* 441 F.2d 114 (2d Cir. 1970) Judge Frankel suggested, in *dicta*, that Government generated pre-indictment publicity could be grounds for dismissal even without a showing of actual prejudice. Judge Mishler, however, held that because "other measures are available to deter and punish prosecutorial conduct . . . it would be inappropriate to give the defendants a 'windfall' by dismissing the indictment simply because some unidentified and possibly low-level member of the prosecutor's office failed to adhere to his duty." [*Id.* at 13]. In coming to this conclusion, Judge Mishler relied on *United States v. Stanford*, 589 F.2d 299 (7th Cir. 1978) *cert. denied*, 440 U.S. 983 (1979).

The court turned next to Rep. Lederer's claim that the indictment should be dismissed pursuant to the court's supervisory power to discourage Government misconduct. Judge Mishler began by stating that courts undoubtedly have supervisory authority over the administration of justice, but that this authority must be invoked with extreme care. He called dismissal of an indictment an "extreme sanction" and stated that under *United States v. Fields,* 592 F.2d 638, 647 (2d Cir. 1978), *cert. denied,* 442 U.S. 917 (1979) dismissal is warranted only—

> . . . to achieve one or both of two objectives: First, to eliminate prejudice to a defendant in a criminal prosecution; second, to help to translate the assurances of the United States Attorneys into consistent performances by their assistants.

As to the first situation described in *Fields*, Judge Mishler stated that Rep. Lederer had failed to show actual prejudice. As to whether dismissal would "help to translate assurances of the United States Attorneys into consistent performances by their assistants," Judge Mishler held that it would not. He stated that the *Fields* court had been referring to situations such as those exemplified by *United States v. Estepa,* 471 F.2d 1132 (2d Cir. 1972)—a case in which an indictment was dismissed because the prosecutor had failed to heed repeated warnings by the court not to use hearsay evidence before the grand jury. In the present case, said Judge Mishler, this pattern of constant disregard of court directives was absent. Further, the present case did not fall within the ambit of *Fields* because here the Attorney General, by instituting an investigation of the disclosures and publicly promising to deal severely with the guilty employees, would provide any necessary deterrence against future Government misconduct.

On July 7, 1980, Rep. Lederer had also moved to dismiss the indictment on the ground that the manner in which the Government conceived of and conducted its investigation was so outrageous and offensive as to constitute a violation of Rep. Lederer's due process rights. In support of this charge of Government overreaching, Rep. Lederer charged that ABSCAM involved gross improprieties and outright illegalities on the part of FBI agents and Department of Justice personnel. According to the defendant, the Government created a criminal enterprise known as Abdul Enterprises whose purpose was originally to uncover those dealing in contraband and stolen property, but which soon turned to luring political targets into a carefully orchestrated scheme of deceit and bribery. These political targets, moreover, were not chosen because of any suspicion that they were involved in criminal activity. Nevertheless, they were enticed to attend meetings with Government undercover agents posing as representatives of an Arab sheik anxious to invest his wealth in legitimate business enterprises in the target's political locale. Once in attendance, the defendant contended, he was lied to and maneuvered into compromising positions through a carefully developed plan in which calculated questions led imperceptibly to illicit activity. Moreover, the sordid scheme was made even more reprehensible by the very presence of Government attorneys at or near the sites of these meetings, who saw to it, through continuing surreptitious communication with the undercover operatives, that Federal jurisdiction was "manufactured." The defendant also charged that in the course of its investigation the Government, in order to protect its undercover operation, violated numerous state and Federal laws, as well as the internal regulations and policies of the FBI and the Department of Justice. For example, it was alleged that Government agents filed false affidavits with a Federal court; allowed one of its undercover operatives to use Abdul Enterprises in order to swindle numerous businessman; illegally established a front organization and filed false statements with Federal agencies; introduced misrepresentations into the banking system by creating a bogus account; and obtained a lease on a townhouse in Washington, D.C. by resorting to false pretenses. The defendant concluded that these systematic abuses by law enforcement authorities culminating in the instant indictment were unprecedented in scale. The only way to maintain the integrity of the judicial process, concluded Rep. Lederer, would be to dismiss the instant indictment.

On August 7, 1980, Judge Mishler filed a memorandum and order addressing Rep. Lederer's claims of Government overreaching. The Judge began by pointing out that Rep. Lederer was not raising an entrapment defense.[7] He also noted that Federal courts do have the power to preclude a criminal prosecution because of Government misconduct. The court would entertain Rep. Lederer's motion, said the Judge, but not before trial as he had requested. Because the defendant was challenging almost every facet of the investigation, the court concluded that a pre-trial hearing would unduly delay the trial. Further, said Judge Mishler, the publicity that would undoubtedly surround such a pre-trial hearing would make it difficult to select an unbiased jury. Accordingly, the court reserved ruling on Rep. Lederer's motion until the conclusion of the Government's case at which point hearings on the matter would be conducted if necessary.

On August 7, 1980, the case was transferred from Judge Mishler to Judge George Pratt.

On January 6, 1981, Rep. Lederer's trial began. Three days later, he was found guilty on all four counts.

On January 12, 1981, the court began hearings on the issue of Government overreaching. These "due process" hearings concluded on February 20, 1981.

On April 8, 1981, Rep. Lederer filed a memorandum in support of his motion to dismiss on the grounds of overreaching. In addition, the memorandum argued that Rep. Lederer was entrapped "as a matter of law." The Government filed a memorandum in response on May 1, 1981.

---

[7] Government overinvolvement and overreaching should not be confused with entrapment. The former is based on the notion that the conduct of law enforcement agents may be so outrageous in a given case as to constitute a denial of a defendant's due process rights. In such cases the focus of judicial inquiry is on the conduct of the Government agents. Entrapment, on the other hand, occurs when a law enforcement agent induces the commission of an offense by a person who was not predisposed to commit the offense. When entrapment occurs prosecution is precluded on the theory that Congress could not have intended to impose criminal punishment on individuals who were induced by the Government to perform a criminal act. The focus of inquiry in entrapment cases is on the state of mind (predisposition) of the defendant. The leading cases on overreaching are *United States v. Russell,* 411 U.S. 423 (1973) and *Hampton v. United States,* 425 U.S. 484 (1976).

On July 24, 1981, Judge Pratt issued an order and memorandum in which Rep. Lederer's motion to dismiss was denied. In his 136 page memorandum, Judge Pratt began his discussion of the case by outlining the claims Rep. Lederer had made in his post-trial motion:

> Defendant Lederer claims he was deprived of due process and that he was the victim of entrapment as a matter of law because Abscam constitutes outrageous conduct on the part of government agents in that they created rather than discovered crime; allowed Weinberg and Amoroso to act in an uncontrolled fashion; manufactured jurisdiction over defendants; selected a venue that would avoid the Third Circuit's decision in *U.S. v. Twigg*, 588 F.2d 373 (CA 3 1978); provided improper incentives for Weinberg; appealed to the civic duty of targets to involve them in Abscam; improperly used "middle men"; attempted to mislead the court and jury about the creation of the "asylum scenario"; permitted an FBI agent, the government prosecutor and Weinberg to separately contract to write books about Abscam; failed to safeguard against entrapment; trapped Lederer into giving a false statement to the FBI; withheld evidence of Weinberg's criminal record; leaked untruthful stories to the press in order to interfere with cooperation among codefendants; destroyed evidence; withheld prior statements of Amoroso and Weinberg; violated the principles of *Brady v. Maryland*, 373 U.S. 83 (1973); and instructed agents to testify falsely and to withhold information at the trial. Lederer further argues that he was entrapped as a matter of law. [Memorandum and Order, July 24, 1981, at 34–35]

Next, Judge Pratt outlined the Government's response [8] to Rep. Lederer's arguments:

> The government argues that the Abscam investigation in its totality was both appropriate and constitutional, that the rights of none of the defendants were violated by the investigation and that there was no exculpatory evidence withheld from the defense. In the government's view, all of the defendants' "due process" contentions basically fall into two categories, neither of which has validity: governmental "over-involvement" in the creation of criminal activity, and the government's failure to take measures to ensure that innocent people would not be wrongfully ensnared and convicted. The government urges that defendants' claims

---

[8] Judge Pratt's July 24th order and memorandum was dispositive not only of Rep. Lederer's due process claims, but also of the claims of Reps. Myers, Thompson, and Murphy who raised similar due process issues during their ABSCAM prosecutions. As a result, the Government's response addressed the claims not only of Rep. Lederer, but also of Reps. Myers, Thompson, and Murphy. Further, whenever in Judge Pratt's memorandum reference is made to the "defendants" it should be understood that the court is referring not only to Rep. Lederer and those indicted with him, but also to all the defendants in the *Myers*, *Murphy*, and *Thompson* ABSCAM cases.

> > cannot be considered in the abstract, for the facts as developed at the trials reveals [sic] a collection of unscrupulous public officials who were never "victimized" by the informant or the intermediaries and whose guilt was clear because they were clearly guilty, not because they had been manipulated to appear in compromising positions before the cameras. Government's memorandum at 1.
>
> The government further argues that the Abscam investigation was pursued in good faith and conducted professionally in view of the circumstances, that no right of any defendant was infringed and, finally, that whether an operation such as Abscam is "good" or "bad" is a matter to be decided initially by the executive branch of our government, subject to legislation by Congress, but does not present judicial questions under the due process clause. [*Id.* at 35–36]

The court then proceeded to group the defendant's challenges into two categories: general and specific. The court found that there were six general challenges, the first of which was that "the indictment should be dismissed because the Abscam investigation did not uncover criminal conduct, but instead created and instigated it." [*Id.* at 49] Before addressing the merits of this attack Judge Pratt discussed at length the law of entrapment: [9]

Having reviewed the law of entrapment, Judge Pratt found that the argument that prosecution must be barred whenever a Government agent provided the impetus for a crime, "simply does not represent the law as established by the United States Supreme Court." [*Id.* at 50] Thus, since the concept of "objective entrapment" had never been recognized by the Supreme Court, Rep. Lederer's entrapment claim was "restricted to principles of subjective entrapment, where the creative activity of the government entraps into criminal conduct a defendant who was not predisposed to commit the crime." [*Id.*] However, said the court, the issue of predisposition is generally a question of fact to be determined by a jury. In the instant case, the court continued, Rep. Lederer had requested a jury charge on the question of entrapment. The jury, in turn, found that he was predisposed. Because the jury's finding was supported by sufficient evidence, said the court, there now existed no grounds upon which that finding could be overturned.

The second general challenge raised by Rep. Lederer was that even if he had not been entrapped, the indictment should be dismissed because the Government's handling of the investigation was so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction. After noting that the defendant's argument was based on the opinions of Justice Rehnquist in *Russell* and *Hampton,* the court disposed of this challenge by stating:

> It is important to recognize, however, that in neither *Russell* nor *Hampton* was the questioned governmental conduct held to be "outrageous". Nor has any other deci-

---

[9] Judge Pratt's discussion of entrapment is printed on pages 50 through 53 of this report.

> sion of the Supreme Court found law enforcement officers' conduct to be so "outrageous" as to require dismissal of an indictment. Thus, even though the Supreme Court has yet to be confronted with or to offer a description of circumstances sufficiently outrageous to warrant dismissal, the governing principle remains that in some case, under some circumstances, the conduct of law enforcement officials may some day bar prosecution. [Rep. Lederer argues] that those cases, those circumstances and that conduct have arrived with Abscam.
>
> It is clear that mere instigation of the crime does not render law enforcement activity "outrageous". Here, the government presented a fictitious sheik, seeking to buy favorable legislative action. Undercover agents offered money in return for defendant legislators' promises to introduce a private immigration bill. In simple terms, bribes were offered by the undercover agents and accepted by the defendant congressmen.
>
> Clearly, the government agents created the opportunity for criminal conduct by offering the bribes. But their involvement falls far short of being "outrageous" for two reasons. In the first place, each of the legislators could simply have said "no" to the offer. *U.S. v. Myers,* 635 F.2d at 939. *Three* other legislators faced with identical offers, Senator Pressler, Congressman Patten and Congressman Murtha did precisely that as shown by the videotapes in evidence as DP Exs. 22, 21, and *Thompson* trial Ex. 29. Second, the extent of governmental involvement here is far less than that in *Hampton,* where the government not only supplied heroin for the defendant to sell, but also produced an undercover agent to buy it from him. Even under those circumstances, where the government was active on both sides of a narcotics sale, the Supreme Court did not consider the agents' conduct to be "outrageous"; *a fortiori* here, where the agents acted only on one side, by offering money to congressmen in return for favors, the involvement of the undercover agents was not "outrageous". [*Id.* at 52–54 (footnotes omitted)]

Rep. Lederer's third general challenge was that "to permit targets to be selected by middlemen violated due process because it did not provide sufficient protection to the innocent." [*Id.* at 54] This argument, said the court, was both legally and factually unsupportable. It was legally infirm, said the court, because "the Constitution does not require reasonable suspicion before a congressman may be made the subject of an undercover sting. *U.S. v. Myers,* 635 F.2d at 940–941. See also *U.S. v. Ordner,* 544 F.2d 24 (CA2 1977)." [*Id.* at 54–55] The argument was factually infirm because "agents did not set out to offer bribes to any particular congressman. They set no standards, established no criteria." [*Id.*]

Rep. Lederer's fourth general argument was that "the inducements offered to the congressmen were overwhelming, designed to overpower their otherwise adequate resistance and to induce honest and innocent people to commit a crime they would normally avoid." [*Id.* at 57 (footnote omitted)] Judge Pratt rejected this argument, stating that the size of the inducement was irrevelant:

> While there may be "inducements" that are "overwhelming", such as a threat against the life of a loved one, when the inducement is nothing but money or other personal gain, this court does not believe that the size of the inducement should be a determinative factor in whether a public official can be prosecuted for accepting it. No matter how much money is offered to a government official as a bribe or gratuity, he should be punished if he accepts. It may be true, as has been suggested to the court, that "every man has his price"; but when that price is money only, the public official should be required to pay the penalty when he gets caught. In short as a matter of law, the amount of the financial inducements here could not render the agents' conduct outrageous or unconstitutional. [*Id.* at 59]

Rep. Lederer's fifth argument was that there was no need for the Government to establish a wholly fictitious operation to ferret out public corruption. The court readily dismissed this argument, stating:

> This court believes that the great majority of government officials, including those in Congress, are honest, hard-working, dedicated and sincere. However, the government needs to have available the weapons of undercover operations, infiltration of bribery schemes, and "sting" operations such as Abscam in order to expose those officials who are corrupt, to deter others who might be tempted to be corrupt, and perhaps most importantly, to praise by negative example those who are honest and square-dealing. Without the availability of such tactics, only rarely would the government be able to expose and prosecute bribery and other forms of political corruption. [*Id.* at 63-64]

Turning to the last of the general challenges—that the convictions were not a reliable measure of his culpability—the court stated that because the essence of the Government's case consisted of videotapes, "A more reliable basis for conviction can hardly be imagined." [*Id.* at 64]

Next, the court considered a number of specific challenges to the operation of ABSCAM. Rep. Lederer's first argument was that ABSCAM was conducted without adequate safeguards, particularly with respect to the supervision of Mr. Weinberg. The problem with the argument, however, said the court, was that Rep. Lederer had failed to show "any direct or specific harm resulting from the alleged lack of supervision." [*Id.* at 66] Moreover, the supervision of Mr. Weinberg, according to the court, was in fact "more than adequate to the circumstances of this investigation." [*Id.*] In this regard, the court stated:

> In an investigation that spanned many months and meetings all along the coast, Weinberg was in virtually daily contact with Amoroso, and his recordings were delivered

> to the FBI for transcribing on a periodic basis. Most importantly, the key events on which the government relied in presenting its cases, the appearances before the videotape cameras, took place in the presence of the FBI agents, and occasionally under the direct supervision of an attorney from the Eastern District Strike Force. Beyond that, supervising agent Good and strike force chief Puccio continually monitored the progress of the investigation, and each reported regularly to their respective superiors in the bureau and the Department of Justice. [*Id.* at 67–68]

Next, Judge Pratt addressed Rep. Lederer's contention that he was prejudiced at trial by the fact that many of the audiotapes made by Mr. Weinberg either contained gaps or were missing. The court disposed of these arguments by finding that no evidence had been introduced to support the assertion that the unrecorded or missing conversations were important.

Rep. Lederer's third specific argument was that dismissal of the indictment was required because during the investigation Government officials violated numerous laws, regulations, and guidelines. Like its predecessors, this argument was rejected by the court. "It is clear", said Judge Pratt, "that for a court to dismiss an indictment there must be not only a constitutional violation, but also some resulting adverse effect or prejudice to the defendant." [*Id.* at 71–72 (citation omitted)] In the instant case, concluded Judge Pratt, Rep. Lederer had shown neither a constitutional violation nor any resulting prejudice.

Another argument raised by Rep. Lederer was that the Government's use of middlemen such as Messrs. Criden, Errichetti, and Silvestri was an irresponsible attempt to insulate the Government from its responsibility to conduct a fair investigation. In effect, said Rep. Lederer, the Government had used these middlemen as its agents and was now responsible for the machinations of those middlemen. In discussing this assertion, Judge Pratt termed it "ludicrous." In the court's view, the Government's use of middlemen "was no more improper than an undercover agent's infiltration of a drug ring in order to gain the confidence of its members and obtain evidence necessary for conviction. *U.S. v. Russell,* 411 U.S. at 432." [*Id.* at 83]

The last major due process challenge concerned the conduct of Mr. Weinberg. It was the defendant's belief that "the government knew that Weinberg was untrustworthy and that defendant's due process rights were violated when the government permitted such a person to play a major role in Abscam." [*Id.* at 93] Judge Pratt addressed this contention by conceding that Mr. Weinberg had an "unsavory background." [*Id.* at 94] But it was precisely because of this background, said Judge Pratt, that Mr. Weinberg was so valuable:

> [Mr. Weinberg's] ability to lie convincingly, his understanding of the corrupt mind and his ability to imagine and execute a grand charade on the scale of Abscam [was the reason] that Weinberg was enlisted for the investigation. Further, Weinberg gave considerable credibility to the entire undercover operation; persons dealing with

> Weinberg in the context of Abscam could check him out with other sources and be wrongly assured that they were not dealing with government agents. Weinberg had a track record that no legitimate government agent could provide or falsify.
>
> Moreover, the government was not required to find Weinberg "reliable", as would be the case if he were an informant whose information was used to obtain a search warrant . . . [T]he basic reliability for the investigation, and ultimately for the prosecutions, was guaranteed by having the crimes committed on camera under circumstances guided by Agent Amoroso and closely supervised by Agent Good. [*Id.*]

With respect to the Defendant's additional argument—that Mr. Weinberg had been given an exorbitant salary by the Government, and that he was promised a bonus for each conviction—Judge Pratt found that in point of fact Mr. Weinberg's remuneration was neither exorbitant nor contingent in any way upon convictions. In addressing the alleged contingent fee agreement, Judge Pratt said:

> Here the court finds that Weinberg's payments in Abscam have not been contingent. Even if they were, however, that would be but one more fact to be weighed in determining the reliability of the results obtained. Payments to informants contingent upon successful prosecution of those with whom they deal have been judicially criticized, but such payments do not require dismissal of an indictment. *See, e.g., U.S. v. Brown,* 602 F.2d 1073 (CA 2 1979); *U.S. v. Szycher,* 585 F.2d 443 (CA 10 1978). [*Id.* at 96]

In addressing the amount of Mr. Weinberg's salary, Judge Pratt said:

> Whether his contribution to law enforcement in these cases and the personal sacrifices [Mr. Weinberg] has endured, during both the investigation and the prosecutions, are worth the amount of money the government has conferred upon him, is perhaps a matter for serious consideration by the justice department and even by congress. It is not, however, a matter upon which this court will pass judgment for purposes of determining whether the fruits of his activities on behalf of the government should be dismissed. How much money is paid to a government informant is peculiarly a decision for the executive department, and not one for judicial review at the behest of a defendant who was caught by the informant's activities. [*Id.* at 97]

On August 13, 1981, Rep. Lederer was sentenced to 3 years imprisonment on each of Counts I, II, and IV, and 2 years on Count III. However, all sentences were ordered to be served concurrently. In addition Rep. Lederer was fined $10,000 for his conviction under Count I and $10,000 for his conviction under Count II, for a total of $20,000. Execution of the prison sentence was stayed pending Rep. Lederer's appeal. The notice of appeal to the U.S. Court of Appeals for the Second Circuit was filed on August 24, 1981. [No. 81-1347]

On January 18, 1982, Rep. Lederer filed his appellate brief. With respect to the due process issue, Rep. Lederer's brief focused on the repercussions ABSCAM-type investigations would have on the American system of government:

> Without any reason for doing so, the Executive Branch actively went after members of the Legislative Branch in an effort to obtain incriminating words and deeds resulting in their prosecution and fall from power. No one can doubt that the public career of Lederer has been destroyed regardless of what this Court does. Whether the end result was the goal of the operation is not important. That it happened and was permitted to happen is.
>
> Permitting government agents to go after members of the Legislative Branch without any reasonable basis to believe they are corrupt and to create criminal activity for the purpose of implicating them in criminality created by the Exectutive Branch crosses the line separating the two powers. We do not dispute that the investigation of reputed or suspected corrupt members of Congress and the use of undercover operatives in such an investigation are legitimate. However, creating crime to ensnare or to tempt innocent legislators is not.
>
> The danger is obvious. It makes possible for a vindictive or manipulative Executive to destroy or intimidate a Senator or a Congressman who does not share the same political philosophy or does not support the programs of the Administration.
>
> It has been alleged that the Congressmen and the Senator implicated in ABSCAM were targeted because they did not support President Carter and instead supported Senator Kennedy as the Democratic nominee for President. Certainly, no one has proven nor probably ever will be able to prove the allegation. What is possible is that a device such as ABSCAM, if it is tolerated and given the imprimatur of the Judicial Branch, could be the vehicle for political reprisals and threats in the future.
>
> The threat that the Executive can contort or mold such legitimate activity into the basis for prosecution intimidates and dampens the independence of the Legislative Branch. Faced with the possibility of an ABSCAM Executive, Congressmen will be reluctant to engage in dialogue with their constitutents thereby impairing their overall function. Thus, to allow the government's agents to create crimes in a perfectly legitimate scenario in order to ensnare Congressmen without any scintilla of evidence of a pattern to bribe-taking among Congressmen in general and of any indicia of predisposition of a particular Congressman to take a bribe has a chilling effect on the effective relationship between a legislator and his constituents. [Brief for Appellant Raymond F. Lederer, January 18, 1982, at 23–24]

In his brief, Rep. Lederer also noted that during trial the Government introduced, over Rep. Lederer's objection, a copy of the Financial Disclosure Statement which Rep. Lederer had filed with the Clerk of the House of Representatives on June 2, 1980. The introduction of the statement, continued Rep. Lederer, violated his rights under the Speech or Debate Clause in that the filing of the statement was required by the House rules which in turn were promulgated pursuant to the Constitutional directive that each house of Congress determine its own rules of proceedings. The introduction of the statement, said Rep. Lederer, was reversible error.

The Government's brief was filed on February 8, 1982. With respect to the statement, the Government said:

> The filing of a personal financial disclosure statement, manifestly, is *not* a legislative act. Indeed, the Ethics in Government Act of 1978, 2 U.S.C. § 701 *et seq.,* pursuant to which the disclosure statement was filed, makes clear that non-legislative financial activities are its only concern. For example, reporting is required only of such non-legislative matters as dividends from stock, rental income, interest income, capital gains, gifts from non-relatives, property interests, liabilities owed to creditors, and honorariums. Indeed, appellant was specifically not required to list income from employment by the United States Government. 2 U.S.C. § 702(a)(1)(A).[13]
>
> Recognizing that the preparation and filing of a disclosure report is not remotely a part of any conceivable legislative process, appellant rationalizes that since it is the duty of a Congressman to file disclosure reports, the Speech or Debate clause bars "the government's use of or reliance upon any acts performed by the Member in the course of his duties in the House." Brief for Appellant at 36. In words that expressly refute this argument, however, the Supreme Court rejected the notion that the Speech or Debate Clause bars the prosecution or investigation of "illegal conduct simply because it has some nexus to legislative functions." *United States v. Brewster, supra* at 528. The Court stated that the fact that members of Congress perform certain acts "in their official capacity . . . does not necessarily make all such acts legislative in nature." *Gravel v. United States, supra* at 625. *Accord, Doe v. McMillan,* 412 U.S. 306, 313 (1973). *See Hutchinson v. Proxmire,* 443 U.S. III (1979) (Senator's newsletters and press releases not protected by the Speech or Debate clause); *In Re Grand Jury Investigation,* 587 F.2d 589 (3rd Cir. 1978) (Congressman's personal telephone calls from his office not subject to Speech or Debate Clause); *United States ex rel Hollander v. Clay,* 420 F. Supp. 853, 856 (D.D.C. 1976) (Congressional travel vouchers not protected by the Speech or Debate clause). Indeed, convictions of Congressmen for submitting falsified documents to various administrative agencies of the House of Representatives have been routinely affirmed without the Speech or Debate Clause troubling either the courts or the defendants. E.g., *United States v. Bramblett,* 348 U.S. 503 (1955) (false statements to Disbursing Office); *United States v. Diggs,* 613 F.2d 988 (D.C. Cir.

1979), *cert. denied,* 446 U.S. 982 (1980) (false statements to House Office of Finance).

Thus, appellant has failed completely to demonstrate that his private finances have any connection with the legislative process in the House of Representatives. In the absence of such a connection, the Speech or Debate Clause did not bar admission of appellant's falsified financial statement at his trial.[14]

---

[13] Significantly, although the Speech or Debate Clause provides protection against civil actions, as well as criminal proceedings, *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 502–03 (1975), Congress specifically authorized the Attorney General to initiate civil proceedings in a United States District Court against any Representative or Senator who falsifies his disclosure statement. 2 U.S.C. § 706. It seems likely that Congress did not regard the assembling and filing of financial disclosure statements as a "legislative activity."

[14] The one case cited by appellant, if anything, proves our point. In *United States v. Eilberg,* 465 F. supp. 1080 (E.D. Pa. 1979), the Spech or Debate Clause was held to bar the use of a Congressman's *testimony* before an ethics committee of the House of Representatives. Testimony by a Congressman before a legislative committee is plainly protected by the Clause as a "Speech or Debate in either House." But here, appellant Lederer is unable to demonstrate that his financial statement was used in connection with a committee proceeding, or shown to a legislator or was the subject of debate in the House of Representatives, let alone that it involved testimony on the House floor.

[Brief for Appellee, February 18, 1982, at 35–36]

Rep. Lederer filed a reply brief on February 26, 1982.

On April 5, 1982, the case was argued before circuit court judges Lombard, Friendly, and Newman.

Status—The case is pending in the U.S. Court of Appeals for the Second Circuit.

The complete text of the July 24, 1981 memorandum and order of the district court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* September 1, 1981.

United States v. Williams

No. 82–1111 (2d Cir.)

On October 30, 1980, U.S. Senator Harrison A. Williams, Jr. of New Jersey was indicted by a Federal grand jury in the U.S. District Court for the Eastern District of New York. Indicted with Senator Williams were Alexander Feinberg, a New Jersey attorney; George Katz, a New Jersey businessman; and Angelo J. Errichetti, the Mayor of Camden, New Jersey and a member of the New Jersey State Senate. [Criminal Case No. 80–00575 (E.D. N.Y.)]

Count I of the nine count indictment charged the defendants with conspiracy,[1] contrary to 18 U.S.C. § 371.[2] Specifically it was alleged that between January 1, 1979 and February 2, 1980 the defendants were involved in a scheme whereby Senator Williams promised to use his influence as a U.S. Senator to attempt to obtain U.S. Government contracts that would benefit a titanium mine and processing facility in Piney River, Virginia. It was alleged that Senator Williams, in return for his promise, received a $100 million loan from "Sheik Yassir Habib" who was, in reality, Richard Farhart, a Special Agent of the Federal Bureau of Investigation ("FBI"). Allegedly, the defendants, along with Habib, Melvin Weinberg (purportedly an agent of Habib but in reality a private citizen assisting the FBI), and "Tony DeVito" (purportedly another Habib agent, but in reality FBI Special Agent Anthony Amoroso, Jr.) formed three corporations into which the $100 million loan was channeled.

---

[1] Specifically, conspiracy to violate 18 U.S.C. § 201 (bribery and fraud) and 18 U.S.C. § 203 (conflict of interest).

[2] 18 U.S.C. § 371 provides: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

According to the indictment, at that point Mr. Weinberg and De Vito, along with defendants Katz, Feinberg, and Errichetti, transferred shares of stock in these corporations to Senator Williams whose name was omitted from the stock certificates in order to conceal his interest. The indictment alleged that it was further a part of the conspiracy that the defendants agreed to sell the corporations to a second group of foreign investors for $70 million, and that, upon sale, Senator Williams would retain a concealed interest in the enterprise and would continue to try to obtain Government contracts for it. The indictment further charged that in addition to promising to exert influence to obtain government contracts Senator Williams promised Habib that he would introduce in Congress a private immigration bill that would enable him to remain in the United States.

Count II charged that Senator Williams, by soliciting and receiving the $100 million loan and the shares of corporate stock in return for his promise to be influenced in his consideration of matters involving the awarding of Government contracts, committed bribery, contrary to 18 U.S.C. § 201(c).[3]

Count III repeated the allegations of Count II, and claimed that such actions and promises by Senator Williams violated the illegal gratuity statute, 18 U.S.C. § 201(g).[4]

Count IV repeated the allegations of Count II, and claimed that such actions and promises by Senator Williams placed him in a position of conflicting interests, contrary to 18 U.S.C. § 203(a).[5]

---

[3] 18 U.S.C. § 201(c) provides: Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) being induced to do or omit to do any act in violation of his official duty shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

[4] 18 U.S.C. § 201(g) provides: Whoever, being a public offical, former public official, or person selected to be a public offical, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[5] 18 U.S.C. § 203(a) provides, in pertinent part: Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks any compensation for any services rendered or to be rendered either by himself or another—

Continued

Count V stated that on August 5, 1979, Senator Williams traveled interstate (from New Jersey to John F. Kennedy International Airport in New York) with intent to promote unlawful activity, to wit, bribery. Such travel was said to violate 18 U.S.C. § 1952 (Travel Act).[6]

Count VI charged that by planning to solicit $70 million for the sale of the three corporations (in which he would retain an interest), and by agreeing to continue his efforts to influence government contract awards, Senator Williams committed bribery, contrary to 18 U.S.C. § 201(c).

Count VII repeated the claims of Count VI, and charged that such promises and actions by Senator Williams violated the illegal gratuity statute, 18 U.S.C. § 201(g).

Count VIII repeated the allegations of Count VI, and charged that such actions and promises by Senator Williams violated the conflict of interest statute, 18 U.S.C. § 203(a).

Count IX charged all defendants with traveling from Washington, D.C. to John F. Kennedy International Airport in New York on September 11, 1979 for the purpose of carrying on an unlawful activity, to wit, bribery, contrary to 18 U.S.C. § 1952.

Each of Counts II through VIII charged the remaining named defendants with aiding and abetting Senator Williams in his illegal activities. Accordingly, the remaining defendants were charged with criminal liability under each of these counts, pursuant to 18 U.S.C. § 2.[7]

On November 6, 1980, Senator Williams pled not guilty to all counts.

On December 5, 1980, Senator Williams filed a motion to dismiss the indictment on the ground that the grand jury considered material protected by the Speech or Debate Clause.[8] Specifically, he alleged that two of his Congressional staff members were subpoenaed to appear before the grand jury where one was questioned in detail about Senator Williams' prior and pending legislative acts regarding private immigration bills, and the other staff member was questioned on the same subject and also about Senator Williams' past legislative actions regarding strategic weapons. Senator Williams also asserted that the grand jury improperly viewed a video-

---

(1) at a time when he is a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia. Resident Commissioner, or Resident Commissioner Elect shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

[6] 18 U.S.C. § 1952 provides, in pertinent part: (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further any unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

[7] 18 U.S.C. § 2 provides: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[8] The Speech or Debate Clause of the United States Constitution provides that "for any Speech or Debate in either House [U.S. Senators and U.S. Representatives] shall not be questioned in any other Place." [art. I, § 6, cl. 1]

tape of a January 15, 1980 meeting between him and Habib during which proposed immigration legislation for the benefit of Habib was discussed. The consideration by the grand jury of these legislative acts, said Senator Williams, tainted the grand jury process and mandated the dismissal of the indictment.

On the same day, the Government filed a memorandum in opposition to Senator Williams' motion to dismiss on Speech or Debate Clause grounds. The Government claimed that Senator Williams' arguments were identical to those raised and rejected in *United States v. Murphy*, and *United States v. Thompson*. (These cases are discussed on page 69 of this report.) The Government argued that an indictment is not normally subject to dismissal on the ground that there was incompetent evidence before the grand jury. Moreover, said the Government, the defendant did not even attempt to show that the grand jury would have had no probable cause to indict had the challenged evidence not been presented to it.

On December 10, 1980, District Court Judge George Pratt denied Senator Williams' motion to dismiss. The court, in its memorandum and order, addressed first the issue of the videotape of Senator Williams and Habib. Judge Pratt reviewed *United States v. Helstoski,* 442 U.S. 477 (1979) and *United States v. Brewster,* 408 U.S. 501 (1972) and found that the Speech or Debate Clause does not prohibit the consideration of evidence of promises to perform *future* legislative acts. Thus, the court held that it was not improper for the grand jury to review videotapes of Senator Williams promising to perform future legislative acts for Habib. With respect to the testimony given by Senator Williams' assistants before the grand jury, the court stated that it was indeed improper for the Government to have questioned the aides regarding Senator Williams' past legislative activities. But this tainted evidence, said the court, did not constitute a substantial portion of the evidence before the grand jury. In addition, said the court, the indictment did not appear to be based on or involve the tainted evidence.

On December 18, 1980, Senator Williams filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit. [No. 80-1474]

On December 23, 1980, Senator Williams moved to dismiss the indictment on the ground of prejudicial pre-indictment publicity. In an accompanying memorandum, the Senator stated that he first became aware that the FBI was investigating him on February 2, 1980 when FBI agents arrived at his Washington, D.C. home and informed him of that fact. Due to leaks from Justice Department personnel to the media, said Senator Williams, film crews from the National Broadcasting Company were aware of the impending FBI visit and recorded the entire event. Thus began the media's involvement in the case—an involvement which was so pervasive that "[b]y the time the grand jury was empaneled on March 17, 1980 all of the allegations against Senator Williams concerning ABSCAM had been fully reported[.]" As a result, "No grand juror could reasonably claim not to have been exposed to it or influenced by it." [Brief on Motion of Harrison A. Williams, Jr. For Dismissal Due to Pretrial Publicity, December 23, 1980, at 7] Fuel for these media reports, explained the Senator, was regularly supplied by Justice Department personnel:

> They have disclosed the names of those under investigation who they believed would be indicted; the crimes which they allegedly committed; the judgment that they did indeed commit such crimes; the precise facts relating to such crimes; the content of particular pieces of evidence, such as videotapes; the testimony which witnesses will give; the supposed mental states and motives of the persons to be accused; the inapplicability, in the government's view, of certain theories, such as entrapment; the validity of the procedures used in conducting the investigation; and the overall importance of the case to law enforcement efforts. [*Id.* at 8]

In support of these contentions, Senator Williams' memorandum included numerous ABSCAM related quotes which appeared in newspapers and Congressional hearing transcripts and which were attributed variously to FBI Director William Webster, U.S. Attorney General Benjamin Civiletti, Assistant U.S. Attorney General Philip Heymann, and "government sources." Senator Williams then went on to explain that the Government's deliberate release of prejudicial information was designed to influence the grand jury:

> While the government was releasing extensive details of their activities to the press, much of which was inaccurate, and while high ranking officials of the Department of Justice continued to make public statements of opinion concerning the strength of cases against the Congressmen involved, nothing by way of exculpatory information has ever been given to the press. The grand jury was exposed to the government's case, and to commentary on the government's case even before being summoned to consider the charges. The government presentation of their case to the press went far beyond the permissible limits of presentation of the case to the grand jury. The government thus has done by indirection, through the use of the press, that which they were prohibited from doing directly in the grand jury room. Through its actions the government assured that the grand jury would be assembled as a mere tool of the government rather than as an independent investigation body. [*Id.* at 21]

The Senator further asserted that he had a right "to have the charges against him presented to a grand jury which was not only free from undue government control . . . but also one . . . insulated from outside community pressures" of the type which necessarily result when the community is continually presented with only such information as the Government chooses to disclose. [*Id.*] After arguing that the Government's conduct violated not only the due process clause but also Rule 6(e) of the Federal Rules of Criminal Procedure (dealing with grand jury secrecy), Senator Williams asserted that the Government's case against him was not a strong one and that the weakness of its case coupled with the outrageousness of its employees' conduct required a dismissal.

On January 14, 1981, the Government filed its response to Senator Williams' motion regarding pre-indictment publicity. The Government stated that "the press treatment of ABSCAM as a whole, was sober, factual and non-accusatory." [Government's Memorandum, January 14, 1981, at 1] In addition, asserted the Government, Senator Williams had failed to show any actual prejudice stemming from the informational leaks. In support of its allegation that a showing of actual prejudice was necessary, the Government pointed to the August 7, 1980 opinion of Judge Mishler in *United States v. Myers*. (See page 46 of this report for a discussion of that case.)

On February 9, 1981, Senator Williams' motion to dismiss on the basis of prejudicial pre-indictment publicity was denied. In a memorandum accompanying the order Judge Pratt stated that arguments similar to Senator Williams' had already been rejected by Judge Mishler in *United States v. Myers, United States v. Lederer,* and *United States v. Thompson*. The court found that Judge Mishler's opinions in those cases were equally applicable to the instant case.

Also on December 23, 1980 (the date of his original motion to dismiss on the basis of prejudicial pre-indictment publicity), Senator Williams filed a motion to dismiss on the ground of selective prosecution. In his supporting memorandum the Senator stated that it was "odd" that six of the seven Members of Congress indicted in ABSCAM were supporters of Senator Edward Kennedy, who was then engaged in a primary battle with President Carter for the Democratic presidential nomination. Further, said Senator Williams, the Kennedy name was used by the Government to draw Kennedy supporters into the Government's web. The Senator stated that FBI Special Agent John McCarthy was represented to be "John McCloud," financial advisor to Senator Kennedy, and FBI Special Agent Margo Demeny was represented to be "Margo Kennedy," a cousin of the Massachusetts Senator. Next, Senator Williams claimed that Democratic National Chairman John White, a close associate of President Carter, was, according to FBI informant James Brewer, also a subject of the ABSCAM investigation. According to Mr. Brewer, said the Senator, a meeting between FBI agents and Mr. White was scheduled, and all signs indicated that Mr. White would accept a bribe. Yet when the meeting took place Mr. White did not take any money. According to Mr. Brewer (who testified about these events before a Senate Judiciary Committee subcommittee on December 2, 1980), said Senator Williams, the failure of Mr. White to accept money indicated to Mr. Brewer that "White was tipped off" by a high Justice Department official. [Brief on Motion of Harrison A. Williams, Jr., for Dismissal of Indictment upon Grounds of Selective Prosecution, December 23, 1980, at 4] The Senator further alleged that the Government went to extraordinary lengths to make it seem, on videotape, that he had committed a crime. Whenever he attempted to explain that he would take no money, said Senator Williams, DeVito would interrupt him or otherwise cut him off. Senator Williams concluded that on the basis of these facts, it was clear that the Government violated his rights to equal protection and freedom of association by targeting him for prosecution based upon his support of Senator Kennedy. Senator Williams called upon the court to allow him to subpoena Government documents relating to selective prosecution. He also requested a hearing on the matter at which the Government would have the burden of proving that selective prosecution did not occur.

Also on December 23, 1980, Senator Williams filed a motion to dismiss certain portions of the indictment. He requested: (1) dismissal of Count I for failure to allege an overt act; (2) dismissal of the conspiracy to defraud portion of Count I for failure to state an offense; (3) dismissal of Counts II, III, and IV as duplicitous (i.e. containing two or more distinct offenses); and (4) dismissal of Counts VI, VII, and VIII as multiplicitous (i.e. charging a single offense in several counts).

At the arraignment of Senator Williams on November 6, 1980, defense counsel had requested that the court schedule a "due process" hearing for December 15, 1980. The purpose of this hearing would be to determine whether Government officials in planning and implementing the investigation of Senator Williams became so involved in the criminal activity they were investigating that any prosecution of the Senator on the basis of evidence procured during the investigation would be barred under the due process clause of the Fifth Amendment. On November 25, 1980, the court decided that the due process hearing should be postponed until after trial.

On December 12, 1980, Senator Williams filed a motion to reconsider the court's November 25, 1980 ruling. The Senator argued that it was improper to compel him to undergo a trial without first considering the due process issues. In support of this contention, Senator Williams referred to the opinion of Circuit Judge Newman in *United States v. Myers*, 635 F.2d 932 (2d Cir. 1980). In *Myers*, Judge Newman had stated that "it would not be too extravagant to suggest that a Member of Congress should be entitled to pretrial review of the denial of any legal claim that could be readily resolved before trial and would, if upheld, prevent trial or conviction on a pending indictment." [635 F.2d at 936]

On January 19, 1981, the Senator's motion to reconsider was denied. In a memorandum issued on February 9, 1981, the court explained its January 19th decision by noting that Judge Newman's suggestion fell considerably short of a requirement that district courts grant all Members of Congress pretrial hearings. Judge Pratt further stated that even if the procedure suggested by Judge Newman were to apply, it still would be limited to a "legal claim" that could "readily" be resolved. "Experience with the Abscam cases," said Judge Pratt, "has shown that the due process claims are substantially grounded upon and intertwined with the evidence presented at trial." [Memorandum, January 19, 1981, at 4] Accordingly, the decision of the court to schedule the due process hearing after trial was not amended.

On January 19, 1981, Senator Williams filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit. [No. 81-1022]

On February 9, 1981, the district court issued a memorandum addressing Senator Williams' December 23, 1980 motion to dismiss on the ground of selective prosecution. The court found that the claim of selective prosecution was one of the issues encompassed in the due process hearing which would be held, if necessary, following trial. Accordingly, a decision on the motion was reserved.

On February 20, 1981, Senator Williams filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit [No. 81-1061] contesting Judge Pratt's decision to reserve ruling on the selective prosecution claims. On March 25, 1981, the circuit court dismissed the appeal as untimely under Rule 4(b) of the Federal Rules of Appellate Procedure.

On March 13, 1981, Senator Williams filed a motion to suppress all tape recordings directly or indirectly involving Mr. Weinberg. In support of this motion, Senator Williams argued that Mr. Weinberg had operated as a "contingent fee informer" who received cash bonuses from the FBI whenever he succeeded in ensnaring high public officials. Thus, Mr. Weinberg "had a special incentive to pick and choose just what would go on tape so he could show government agents that he was succeeding and would then receive more money immediately. If indictments were later thrown out, at least he had his money in advance." [Brief on Motion of Harrison A. Williams, Jr. to Suppress All Tape Recordings Directly or Indirectly Involving Melvin Weinberg, March 13, 1981, at 6] Further, said Senator Williams, Mr. Weinberg exercised so much control over the decision whether to tape record particular conversations that "we have a total of 176 tapes which have problems of one kind or another. Either they start in the middle of a conversation or have gaps. Those with gaps or which stop during a conversation often go blank when obviously significant subjects are to be discussed." [*Id.* at 7] Relying on *United States v. Fields,* 592 F.2d 638 (2d Cir. 1978), *cert. denied,* 442 U.S. 1917 (1979) and *United States v. Brown,* 462 F. Supp. 184 (S.D.N.Y. 1978), Senator Williams argued that there were other remedies, short of dismissal, which a court could invoke to deter such misconduct. One remedy, continued Senator Williams, and an appropriate one in this case, was suppression of the tainted evidence:

> As this Court has seen in the prior ABSCAM cases there is no question but that tape evidence is very powerful, hardly matched by testimony. If a government agent at his whim and in his own pecuniary interests can decide what tape evidence the jury will hear, whereas the defendant is left to rely upon only testimonial evidence as to what happened at other times, then a miscarriage of justice is almost a certainty. The presumption of innocence and, indeed, the right of trial by jury might as well be a nullity. Implicit in the Supreme Court's holding in *Brady v. Maryland,* 373 U.S. 83 (1963), is the fundamental constitutional principle that in a criminal prosecution the government ought not be allowed to determine the evidence the jury shall hear or shall not hear. [*Id.* at 12]

Senator Williams' motion to suppress the tapes was denied by Judge Pratt from the bench. On March 25, 1981, Senator Williams filed a notice of appeal to the Second Circuit. [No. 81-1097] On March 26, 1981, the circuit court dismissed the appeal, holding that under *United States v. Myers,* 635 F.2d 932 (2d Cir. 1980) claims that could not be readily resolved by an appellate court should not be given appellate review prior to trial.

On March 27, 1981, the U.S. Court of Appeals for the Second Circuit issued an order affirming Judge Pratt's denial of Senator Williams' December 5, 1980 motion to dismiss on Speech or Debate Clause grounds. In this same order, the circuit court also affirmed Judge Pratt's denial of Senator Williams' December 12, 1980 motion to reconsider Judge Pratt's November 25, 1980 decision to postpone the due process hearings until after trial. The circuit court's opinion explaining its decisions was filed on March 31, 1981. [*United States v. Williams,* 644 F.2d 950 (2d Cir. 1981)]

Turning first to the Speech or Debate Clause issues, the circuit court stated that although Senator Williams' aides should not have been questioned before the grand jury on Senator Williams' past legislative actions, the introduction of this tainted testimony raised no "substantial question of whether the grand jury had sufficient competent evidence to establish probable cause." [*Id.* at 952, quoting *United States v. Myers,* 635 F.2d 932, 941 n.10 (2d. Cir. 1980), *cert. denied,* 449 U.S. 826 (1980)]

With respect to the timing of the due process hearings, the circuit court stated that even assuming, *arguendo,* that Judge Pratt's decision to postpone the due process hearings until after trial could be appealed prior to trial, Judge Pratt's order "was not erroneous." [*Id.*] In this regard the court stated:

> Rule 12(e) of the Federal Rules of Criminal Procedure provides that for good cause a district judge may defer consideration of a pretrial motion until after trial. This Court's decision in *United States v. Myers, supra,* should not be construed to automatically exempt members of Congress from the operation of this rule. Our "suggestion" in *Myers* that members of Congress should have a preferred right to pretrial review was directed primarily to those cases in which the defendant's congressional status is intrinsic to his claimed right of dismissal. The suggestion assumed moreover that the issues raised by the defendant's motion are readily resolvable in advance of trial. Here, Judge Pratt, relying on his own experience and that of other judges presiding at ABSCAM trials, determined that it would be impractical and unwise to attempt pretrial resolution of the due process claims, because they are substantially founded upon and intertwined with the evidence to be presented at trial. His consequent decision to defer consideration of the due process claims until after trial was therefore entirely proper. Because full development of the facts would help the district judge in reaching a wise decision, postponement was not without benefit to appellant. [*Id.* at 952–953]

On March 30, 1981, Senator Williams' trial began. On May 1, 1981, Senator Williams was found guilty on all nine counts. No sentencing date was set.

On June 22, 1981, the court commenced four days of hearings on Senator Williams' due process claims.

On December 22, 1981, Judge Pratt issued a post-trial memorandum and order addressing Senator Williams' motion to suppress and motion to dismiss on due process grounds. [*United States v.*

Williams, 529 F. Supp. 1085 (E.D.N.Y. 1981)] With respect to suppression of the tapes, the court found that Senator Williams' motion to suppress was not filed in the appropriate form for purposes of Rule 12 of the Federal Rules of Criminal Procedure. Accordingly, the court found that Senator Williams had waived his right to challenge the tapes on Fourth Amendment grounds. With respect to due process violations by Abscam investigators, the court found that some of Senator Williams' arguments were in reality entrapment arguments and that most of those arguments were identical to the arguments raised by the defendants and rejected by Judge Pratt in his decision in *United States v. Myers,* Cr. No. 80-00249 (E.D.N.Y. July 24, 1981). (See page 37 of this report for a discussion of the *Myers* case.) Two new challenges raised by Senator Williams—that the jury instructions on entrapment were erroneous and that there was insufficient evidence for the jury to find that he was predisposed to commit the crimes—were rejected by the court.

Turning to the true due process issue (*i.e.,* whether the conduct of Abscam investigators was so outrageous as to bar prosecution as a matter of law), the court reviewed Senator Williams' specific examples of conduct allegedly constituting outrageous behavior. First, Senator Williams had alleged that immediately prior to a June 28, 1979 meeting between Senator Williams and Habib, Messrs. Amoroso and Weinberg had instructed Senator Williams to exaggerate his influence and power when speaking to Habib. Because of this "coaching," said Senator Williams, the FBI tape of the meeting gave the jurors a misleading and prejudicial view of Senator Williams' involvement in the alleged crime. After reviewing the record, however, Judge Pratt found that the trial testimony of Senator Williams himself refuted the argument that anyone had "put words in his mouth." Second, Senator Williams had alleged that Mr. Amoroso deliberately interrupted a meeting between Habib and Senator Williams when it became apparent to FBI investigators filming the meeting that Senator Williams was about to explain why he did not want money in return for immigration assistance. The court rejected this argument, however, finding that the evidence supported the view that the interruption by Mr. Amoroso was not intentional, and that even if it was intentional the Senator was later given an opportunity to explain his reason for refusing the money. Third, Senator Williams had argued that because a November 27, 1979 internal FBI memorandum had suggested that the case against Senator Williams was weak, the Justice Department should have dropped its investigation. The court responded to this argument by stating, "Merely because some government employees were not overly impressed with the strength of the Williams case . . . does not mean that the government was precluded from testing the sufficiency of its evidence before the grand jury . . . or from convincing a petit jury of defendants' guilt beyond a reasonable doubt." [*Id.* at 1100] With respect to selective prosecution, the court held that it simply did not occur, stating, "The court further finds that there were no orders from superiors directing the investigators to focus upon particular individuals, nor were there any orders forbidding them from pursuing any leads that the investigation opened up." [*Id.* at 1101] Similarly rejected by the court was the argument that the amount of money offered Senator Williams constituted an unfair temptation. The court concluded its opinion by reviewing—and dismissing—a number of claims that the Government had engaged in misconduct during trial.

Senator Williams was sentenced on February 16, 1982. Under each of Counts I, II, V, VI, and IX, Senator Williams was sentenced to 3 years imprisonment and a $10,000 fine. Under each of Counts III, IV, VII, and VIII, he received a sentence of two years imprisonment and a $10,000 fine. All of the prison sentences were ordered to run concurrently. As for the fines, those imposed under Counts II, III, and IV were made concurrent, as were those imposed under Counts VI, VII, and VIII. Thus the total fine was $50,000 (*i.e.*, Count I—$10,000; Counts II, III and IV—$10,000; Count V—$10,000; Counts VI, VII and VIII—$10,000; Count IX—$10,000). Execution of the sentence was stayed pending the outcome of the likely appeal.

On March 10, 1982, Senator Williams filed a motion to reopen the due process hearings and to reargue his March 13, 1981 motion to suppress the Weinberg tapes.

According to the Senator, a recently discovered affidavit of Marie Weinberg, Melvin Weinberg's wife, and a transcript of her conversations with a news reporter, Indy Badhwar, represented "tangible evidence of Weinberg's perjury and clear evidence of extensive perjury by Government agents before this Court and others considering Abscam cases." [Notice of Motion to Reopen . . . , March 10, 1982, at 5]

In the affidavit, which was signed by Mrs. Weinberg shortly before her death in January 1982, Mrs. Weinberg stated, "I make this affidavit because I feel my husband committed perjury with the knowledge of the FBI which injured a number of innocent people and I want the truth to be known." [*Id.*, Exhibit A, at 7] Specifically, in the affidavit and transcript Mrs. Weinberg alleged that Mr. Errichetti gave Mr. Weinberg a number of "gifts" including three television sets and a stereo system. She also stated that FBI agents apparently lost 44 recorded tapes which had been in her home and which, upon request, she had turned over to FBI agents. These allegations, said Senator Williams, constituted evidence that: (1) the tapes introduced into evidence were not processed or stored in a tamper-proof fashion; and (2) Government agents intentionally failed to disclose the fact that Mr. Weinberg received gifts from Mr. Errichetti, and knew that Mr. Weinberg was committing perjury at trial when he denied receipt of the gifts.

On March 25, 1982, Judge Pratt issued a memorandum and order denying Senator Williams' motion to reopen and reargue. [*United States v. Williams*, Cr. No. 80-00575 (E.D.N.Y. March 24, 1982] [9] With respect to the tapes, Judge Pratt held that even assuming, *arguendo*, that Mrs. Weinberg's allegations regarding lost tapes were true they would not have supplied a basis for suppressing the tapes that were introduced at trial. With respect to the Errichetti gifts to Mr. Weinberg, the court pointed out that if the due process hearings were reopened "the FBI agents would simply reassert their ignorance about the gifts" and that, in any event, "the law does not automatically require a hearing for every claim that a prosecutor may have let pass a false statement by a witness." [534 F. Supp. at 757]

---

[9] This case was reported as *United States v. Myers*, 534 F. Supp. 753 (E.D.N.Y. 1982).

On March 26, 1982, Senator Williams filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit. [No. 82-1111]

On June 1, 1982, Senator Williams filed two briefs in the circuit court. One brief addressed "trial error and procedural issues"; the other addressed "due process and entrapment issues." Regarding the trial and procedural issues, Senator Williams made four arguments: (1) the jury instructions regarding predisposition were erroneous; (2) "similar act" evidence against Senator Williams was improperly considered; (3) the prosecutor consistently misled the jury; and (4) the tape recordings made by Mr. Weinberg should have been suppressed. On this last point, Senator Williams claimed that the tapes were "inherently untrustworthy" in that "it was Weinberg, a liar, thief and con artist, who was paid to ensnare politicians, who decided when to start and stop the . . . tapes, . . . when to erase or record over tapes, and when to turn them over to government agents, if at all." [Appellant Harrison A. Williams, Jr.'s Brief on Trial Error and Procedural Issues, June 1, 1982, at 34] The lower court's decision to admit the tapes, said Senator Williams, was contrary to *United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976) which, according to the Senator, "recognized the special need for safeguards when dealing with tape evidence and the resultant requirement of strict chain of custody standards." [*Id.* at 35]

In his "due process and entrapment issues" brief, Senator Williams asserted, first, that the jury was given erroneous instructions on the law of entrapment and, second, that the jury could not properly have found beyond a reasonable doubt that he was predisposed to commit the crimes charged. Turning next to the due process issues, Senator Williams asserted that the actions of the Government, taken as a whole, were so outrageous that they amounted to a denial of due process. Senator Williams then proceeded to list the 11 elements which in his view constituted the outrageous behavior:

> (1) the Government hired an unprincipled con-man and used him as an agent provocateur; (2) the Government had no basis for bringing Senator Williams into their trap; (3) the Government commenced extensive electronic surveillance without any reason to believe that criminal activity was afoot; (4) the "self-selecting" mechanism which the Government claimed ensured the reliability of the ABSCAM operation was eliminated from the present case; (5) the Government conducted their activities with total disregard for the predilections or intent of the defendants if left to their own devices; (6) the Government would not accept no for an answer; (7) the Government agent "coached" Senator Williams for his crucial meeting with the Sheik and assured him that it was only an act; (8) the Government offered exorbitant and unrealistic financial inducements; (9) the Government used all of the Senator's friends as unwitting Government agents; (10) the Government preserved evidence [i.e. the tapes] in a manner that disrupted the truth-seeking process; and (11) the Government denied Senator Williams his right to a disinterested

> prosecutor [since the prosecutor, Mr. Puccio, had also been an ABSCAM investigator]. [Brief of Appellant on Due Process and Entrapment Issues, June 1, 1982, at i–ii]

On June 7, 1982, Senator Williams filed a supplemental brief on the trial and procedural issues. In it, he argued that: (1) the conspiracy-to-defraud allegation of Count I should have been stricken because it erroneously referred to the "Government's" (rather than the "people's") right to the corruption-free services of a U.S. Senator; (2) Counts IV and VIII should have been dismissed for failing to allege the *particular* matter in regard to which Senator Williams sought illegal compensation; (3) Count I should have been dismissed as duplicitous; and (4) Counts II, III, IV, VI, VII and VIII should have been dismissed because the statutes upon which they were based prohibit a Member's receiving, in return for official services, something "of value"—not, as was here the case with respect to the stock certificates, something of *purported* value.

On August 5, 1982, the Government filed a 177 page brief which responded to the arguments contained in the briefs previously filed by Senator Williams. With respect to the due process issues, the Government began by listing a number of occasions on which Senator Williams, had he been so inclined, could have rejected the illegal proposals of the Government agents. Next, the Government argued that the authority for the position that there even existed a due process defense was "tenuous at best." [Brief for Appellee, August 5, 1982, at 58] In any event, said the Government, if the defense did exist it would have to involve "government conduct . . . so demonstrably 'outrageous' that it is 'shocking to the universal sense of justice.' *Russell, supra,* 411 U.S. at 432, quoting *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 246 (1950)." [*Id.* at 60 (citations omitted)] Further, the Government stated that the difficulty of detecting consensual crimes, such as bribery, had caused courts to uphold police tactics which, in other contexts, could be considered offensive. Thus, said the Government, it would be "especially difficult" for Senator Williams to secure the dismissal of the instant indictment on due process grounds. Addressing each of Senator Williams' 11 specific allegations of improper conduct, the Government responded that: (1) Mr. Weinberg was no more an "agent provocateur" than was Agent Amoroso and that "pretended friendship . . . is simply classic undercover behavior for both informants and agents." [*Id.* at 69]; (2) the decisions in *United States v. Myers,* 635 F.2d 932, 941 (2d Cir.), *cert. denied,* 449 U.S. 956 (1980) and *United States v. Ordner,* 554 F.2d 24, 27 (2d Cir.) *cert. denied,* 434 U.S. 824 (1977) made clear that undercover agents may properly contact an individual even though they have no reason for suspecting that he engaged in prior criminal activity; (3) Senator Williams had waived his right to contest the introduction of the tapes by failing to file a timely motion to suppress and that, in any event, one-party consensual tape recordings are clearly legal; (4) the evidence showed that Senator Williams "selected himself" for meetings with the undercover operatives; (5) Senator Williams' argument that he had no "predilections" to commit the crime was simply a restatement of the entrapment defense—a defense the jury had rejected; (6) the evidence showed that Senator Williams never availed himself of the numerous opportunities to say "no"; (7) the evidence showed that despite the coaching, Senator Williams acted voluntarily and intentionally; (8) the magnitude of an inducement was irrelevant to a due process claim ("Since the entrapment defense focuses on two elements, government inducement and the defendant's predisposition, both of which must be considered to establish this non-constitutional defense, it is illogical to contend that inducement alone can be a due process violation." [*Id.* at 26 (footnote omitted)]); (9) Senator Williams' argument that his friends should not have been used as intermediaries was directly contrary to his assertion that the objects of an undercover operation must be "self-selected"; (10) Senator Williams, in his testimony, never gave any indication that exculpatory, but non-recorded, conversations took place; (11) there was no authority for the proposition that a prosecutor who supervises an investigation must disqualify himself from the case.

Status—The case is pending in the U.S. Court of Appeals for the Second Circuit.

The complete text of the February 9, 1981 opinion of the district court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* March 1, 1981.

The complete text of the March 31, 1981 opinion of the circuit court is printed in the "decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* September 1, 1981.

The complete text of the December 22, 1981 opinion of the district court is printed in the "Decisions" section of *Court Proceedings and Actions of Vital Interest to the Congress,* March 1, 1982.

The complete text of the March 24, 1982 opinion of the district court is printed in the "Decisions" section of this report at page 678.

○